

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(1) NATURE OF PARTNERSHIP/1. Meaning of 'partnership' and 'firm'.

PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)

1. CREATION AND DURATION

(1) NATURE OF PARTNERSHIP

1. Meaning of 'partnership' and 'firm'.

Partnership¹ is the relation which subsists between persons carrying on a business in common with a view of profit². The persons who have entered into partnership with one another are called collectively a 'firm'³. The parties who make up a partnership may be individuals, companies (as in corporate partnerships)⁴ or may be other partnerships (as in group partnerships)⁵.

The relation between members of any company or association which is a company registered under the Companies Acts⁶, or formed or incorporated by or in pursuance of any other Act of Parliament, letters patent or royal charter, is not a partnership⁷, although some of the latter may be partners with one another⁸. The relation between promoters associated only to form a company is not a partnership⁹; nor is the relation between executors carrying on under the powers of the will and in the same firm name a business owned solely by their testator in itself a partnership¹⁰. It is also unlikely that a purely domestic arrangement will constitute a partnership¹¹.

1 An ordinary partnership is a partnership composed of definite individuals, bound together by contract between themselves to continue combined for some joint object either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another: *Smith v Anderson* (1880) 15 ChD 247 at 273, CA, per James LJ. It would appear that, in some circumstances, what is registered as a partnership for VAT purposes (see PARA 103; and **VALUE ADDED TAX**) can also make supplies as an unincorporated association: *Alberni String Quartet v Customs and Excise Comrs* [1990] VATTR 166 (an unusual case). Since the basis of the relationship between partners is contractual, this contract, like any other contract, may be brought to an end by the repudiatory breach of a partner (*Hitchman v Crouch Butler Savage Associates* (1983) 127 Sol Jo 441, CA; *Fulwell v Bragg* (1982) 127 Sol Jo 171; *Redgrave v Hurd* (1881) 20 ChD 1, CA; *Adam v Newbigging* (1888) 13 App Cas 308, HL); but such acceptance does not necessarily end the relationship: see PARA 180. It may also be set aside for undue influence (see *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853 (tenancy agreement giving the defendant partner an option to purchase a farm upon terms which were very favourable to the latter)): see further **CONTRACT**. Partnership differs from a company or association which continue even if the members are constantly changing (*Smith v Anderson*). On any change of partner, the old partnership ends and a new one begins: see **COMPANIES** vol 14 (2009) PARA 1 et seq. For a review of the old authorities which define a partnership see *Pooley v Driver* (1876) 5 ChD 458 at 471 et seq per Jessel MR.

2 Partnership Act 1890 s 1(1). As to the sharing of profits as evidence that a partnership exists see PARA 15. The Partnership Act 1890 is merely declaratory (*British Homes Assurance Corp'n Ltd v Paterson* [1902] 2 Ch 404 at 410 per Farwell J) and, except so far as they are inconsistent with the express provisions of the Partnership Act 1890, the rules of equity and of common law applicable to partnership are still in force (s 46). Where persons intend to become partners together, they do not become such unless and until they commence trading as such. Before they commence trading, no partnership exists (*Dickinson v Valpy* (1829) 10 B & C 128 at 140 per Parke J; *Howell v Brodie* (1839) 6 Bing NC 44), although it may be that persons as yet merely intending to enter into partnership together may owe each other a duty of good faith, *sed quaere*. As to when trading begins see *Khan v Miah* [2001] 1 All ER 20, [2000] 1 WLR 2123, HL; and PARAS 4, 6. As to prospective joint venturers see *Lac Minerals Ltd v International Corona Resources Ltd* [1990] FSR 441, Can SC. As to partners' duty of good faith generally see PARA 106; and as to the duration of partnerships see PARA 43 et seq.

3 Partnership Act 1890 s 4(1). The name under which their business is carried on is called the 'firm name': s 4(1).

4 For examples of corporate partnerships see *Re Rudd & Son Ltd* [1984] Ch 237, [1984] 3 All ER 225; *Newstead v Frost* [1980] 1 All ER 363, [1980] 1 WLR 135, HL (individual and company in partnership together). As to difficulties which may be encountered where one or more members of a firm are companies see eg *Scher v Policyholders Protection Board* [1993] 3 All ER 384, [1993] 2 WLR 479, CA; varied sub nom *Scher v Policyholders Protection Board (No 2)* [1993] 4 All ER 840, [1993] 3 WLR 1030, sub nom *Scher v Policyholders Protection Board (Nos 1 and 2)* [1994] 2 AC 57, [1994] 2 All ER 37n, HL.

5 For an example of a group partnership (and the problems that can arise in the management of such partnerships) see *Nixon v Wood* [1987] 2 EGLR 26, CA.

6 See **COMPANIES** vol 14 (2009) PARA 16 et seq.

7 Partnership Act 1890 s 1(2) (amended by the Statute Law (Repeals) Act 1998). It has been held that a family company, ie a company owned and run by and for the benefit of members of a family, may fall into the category of 'quasi partnership' involving similar relations of mutual trust and understanding as are symptomatic of a partnership proper: see eg *Jesner v Jarrad Properties Ltd* [1992] BCC 807, Ct of Sess; *O'Neill v Phillips* [1999] 2 All ER 961, [1999] 2 BCLC 1, HL.

8 See PARA 37.

9 *Wood v Duke of Argyll* (1844) 6 Man & G 928; *Keith Spicer Ltd v Mansell* [1970] 1 All ER 462, [1970] 1 WLR 333, CA. Promoters may be partners if they carry on in common with a view of profit the business of buying property in order to sell it to a company or companies which they form to purchase it. See further **COMPANIES** vol 14 (2009) PARA 67.

10 *Re Fisher & Sons* [1912] 2 KB 491. Representatives of a deceased partner who are entitled to profits, but who never interfere in the business, are not liable as partners in the firm: *Holme v Hammond* (1872) LR 7 Exch 218.

11 *Britton v Customs and Excise Comrs* [1986] VATTR 209 (husband and wife). Where a partnership does not exist, but an individual has allowed himself to be represented as being a partner, the court has no jurisdiction to wind up the insolvent 'partnership': see *Re C & M Ashberg* (1990) Times, 17 July. As to the dissolution of partnerships generally see PARA 174 et seq; and as to insolvent partnerships generally see PARAS 99, 233; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 817 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1166-1301.

UPDATE

1 Meaning of 'partnership' and 'firm'

TEXT AND NOTES 6-8--Partnership Act 1890 s 1(2) amended: SI 2009/1941.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(1) NATURE OF PARTNERSHIP/2. Lack of legal personality.

2. Lack of legal personality.

Under English law it has long been established that a partnership or firm is not a 'person' or legal entity¹, although the firm may sue and be sued in the firm name². However, some legislation does render partnerships criminally liable as independent entities³. Under the Corporate Manslaughter and Corporate Homicide Act 2007, a partnership is guilty of corporate manslaughter if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the partnership to the deceased⁴; and for these purposes a partnership is to be treated as owing whatever duties of care it would owe if it were a body corporate⁵. A firm or partnership also enjoys some degree of recognition as a separate entity for the purposes of taxation legislation⁶.

In contrast, the legal entity known as a limited liability partnership is clearly a body corporate with legal personality separate from that of its members⁷.

1 *Sadler v Whiteman* [1910] 1 KB 868 at 889, CA, per Farwell J ('In English law a firm as such has no existence'); *Re Vagliano Anthracite Collieries Ltd* (1910) 79 LJ Ch 769; *R v Holden* [1912] 1 KB 483 at 487, CCA; *Meyer & Co v Faber (No 2)* [1923] 2 Ch 421, CA. As to the separate legal personality of companies see **COMPANIES** vol 14 (2009) PARA 2.

For examples of how the courts have approached the issue of legal personality see *Sheppard & Cooper Ltd v TSB Bank plc* [1997] 2 BCLC 222, [1996] 12 LS Gaz R 30, CA ('When you have a big firm of accountants, or solicitors . . . , a reference in a contract of this nature to 'the firm' must be taken to mean the partners for the time being of the firm, whenever the time arises': per Sir John Balcombe LJ at 227); *Kelly v Northern Ireland Housing Executive, Loughran v Northern Ireland Housing Executive* [1999] 1 AC 428, [1998] 3 WLR 735, HL (a firm, as a service provider, could be engaged in a contract 'personally to execute any work or labour' through an individual partner); *Dave v Robinska* [2003] ICR 1248, [2003] NLJR 921, [2003] All ER (D) 35 (Jun), EAT (a claim could be brought by an expelled partner against the sole remaining partner, in the remaining partner's own name on the basis that he represented the firm; if a complaint was made by an expelled partner in a larger partnership, proceedings would be brought against the remaining partners).

2 See PARA 79 et seq. As to the firm name see PARA 7.

3 See the Sea Fishing (Enforcement of Community Control Measures) Order 2000, SI 2000/51, art 11(2), which provides that where any offence under art 3 committed by a partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership is guilty of the offence and is liable to be proceeded against and punished accordingly. It was held in *R v W Stevenson & Sons (a partnership)* [2008] EWCA Crim 273, (2008) Times, 5 March, [2008] All ER (D) 351 (Feb) that it is possible for this provision to render a partnership criminally liable as a separate entity from the individual partners. Inasmuch as business activities were conducted in the name of a partnership and the partnership had identifiable assets that were distinct from the personal assets of each partner, there was no reason why a partnership should not be treated, for the purposes of the criminal law, as a separate entity from the partners who were members of it: *R v W Stevenson & Sons (a partnership)*.

4 Corporate Manslaughter and Corporate Homicide Act 2007 s 1(1), (2)(d).

5 Corporate Manslaughter and Corporate Homicide Act 2007 s 14(1). Proceedings for an offence under the Act alleged to have been committed by a partnership are to be brought in the name of the partnership (and not in that of any of its members): s 14(2). A fine imposed on a partnership on its conviction of an offence under the Act is to be paid out of the funds of the partnership: s 14(3). Section 14 does not apply to a partnership that is a legal person under the law by which it is governed: s 14(4).

6 See eg the Value Added Tax Act 1994 s 45; and PARA 103.

7 See the Limited Liability Partnerships Act 2000 s 1(1), (2); and PARA 234.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(1) NATURE OF PARTNERSHIP/3. Partnerships and limited liability.

3. Partnerships and limited liability.

One significant difference between a partnership and a company is that, in general, a partnership does not confer limited liability on the partners. However, there are two forms of partnership which do enjoy limited liability, namely:

- 1 (1) limited partnerships¹; and
- 2 (2) limited liability partnerships².

1 le a partnership formed under the Limited Partnerships Act 1907 which allows a limited partner's liability to the creditors of the firm to be strictly limited: see PARA 218 et seq.

2 le a body corporate, with legal personality separate from that of its members, which is governed by the Limited Liability Partnerships Act 2000, the Limited Liability Partnerships Regulations 2001, SI 2001/1090, and the Limited Liability Partnerships (No 2) Regulations 2002, SI 2002/913: see PARA 234 et seq.

UPDATE

3 Partnerships and limited liability

NOTE 2--SI 2002/913 revoked: SI 2009/1804.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(1) NATURE OF PARTNERSHIP/4. Essentials of partnership.

4. Essentials of partnership.

Partnership involves a contract between the partners to engage in a business with a view to profit¹. For the purpose of determining whether a partnership has commenced, persons who have agreed to carry on a business as a joint venture are not partners until they embark on the activity in question².

Each partner may contribute either property, skill or labour. A person who contributes property without labour, and has the rights of a partner, is usually termed a 'sleeping' or 'dormant partner', but a sleeping partner may, however, contribute nothing at all³.

The question whether or not there is a partnership is one of mixed law and fact⁴.

1 'I have always understood the definition of partnership to be a mutual participation in profit and loss' (*Green v Beesley* (1835) 2 Bing NC 108 at 112 per Tindal CJ); but this cannot now be regarded as an exhaustive definition. Cf *Jeffrey v Bamford* [1921] 2 KB 351 at 358, 359 per McCardie J ('community or participation in loss' is not 'essential to the legal notion of partnership').

2 *Khan v Miah* [2001] 1 All ER 20, [2000] 1 WLR 2123, HL. 'The question is not whether the [business] had commenced trading, but whether the parties had done enough to be found to have commenced the joint enterprise in which they had agreed to engage': per Lord Millett at 25 and 2128.

3 *Pooley v Driver* (1876) 5 ChD 458 at 472, 473.

4 *Keith Spicer Ltd v Mansell* [1970] 1 All ER 462 at 463, [1970] 1 WLR 333 at 335, CA, per Harman LJ. See also *Saywell v Pope (Inspector of Taxes)* [1979] STC 824.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(1) NATURE OF PARTNERSHIP/5. Relation between partners.

5. Relation between partners.

The relation between partners is not that of debtor and creditor, unless and until the partnership accounts have been finally taken after dissolution and a balance has been ascertained to be owing from one to another¹.

¹ *Richardson v Bank of England* (1838) 4 My & Cr 165 at 171, 172; *De Tastet v Shaw* (1818) 1 B & Ald 664. An order for the taking of an account will not be ordered where to do so would serve no useful purpose: *Brown v Rivlin* [1983] CA Transcript 56 (retired partner whose share had passed to the continuing partner under the terms of the partnership agreement held not to have a continuing interest in the firm's assets, so that the continuing partner was able to pursue the retired partner in respect of a specific sum of money wrongfully extracted from the firm without having to take a partnership account first); applying *Gopala Chetty v Vijayaraghavachariar* [1922] 1 AC 488, PC. Cf *Prole v Masterman* (1855) 21 Beav 61 (where, in relation to a debt owed to a director of a company, the ordinary rule was defeated simply because the other directors had not pursued an action for an account themselves); and see PARA 158. As to the acknowledgment or part payment of a debt by one partner to another see PARA 199. As to dissolution see PARA 174 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(1) NATURE OF PARTNERSHIP/6. Business.

6. Business.

The existence of a business is essential to a partnership, and for this purpose 'business' includes every trade, occupation or profession¹. The idea involved is that of joint operation for the sake of gain². Therefore, voluntary associations for the purpose of carrying out temporary functions of a social character are not partnerships³. Instances of other associations for a common object which are not partnerships, properly so called, are clubs⁴, trade protection societies⁵ and building and other benefit societies⁶.

A partnership did not formerly exist⁷ between the trustees of a deed for the benefit of creditors and the debtor or between the inspector and committee under a deed of inspectorship and the debtor when the debtor was employed to carry on the business under the supervision of the trustees or inspector and committee⁸, especially if the object of the arrangement was to wind up the business and not to continue it with a view to future profits⁹.

1 Partnership Act 1890 s 45. It also includes a separate commercial adventure: *Re Abenheim, ex p Abenheim* (1913) 109 LT 219. 'To constitute a partnership the parties must have agreed to carry on business, or to share profits in some way in common': *Mollwo, March & Co v Court of Wards* (1872) LR 4 PC 419 at 436 per Sir Montagu Smith. As to the phrase 'carrying on business' see *Pathirana v Pathirana* [1967] 1 AC 233 at 239, [1966] 3 WLR 666 at 670, 671, PC, per Lord Upjohn. See also *Khan v Miah* [2001] 1 All ER 20, [2000] 1 WLR 2123, HL.

A trading partnership has been defined as one which consists of buying and selling goods: *Higgins v Beauchamp* [1914] 3 KB 1192 at 1195, DC, per Lush J (business of cinematograph theatre proprietors not trading partnership); and see *Wheatley v Smithers* [1906] 2 KB 321, CA (auctioneers not trading partnership). In order to ascertain whether or not a particular concern amounts to a 'trade', that concern's transactions as a whole must be construed, and such a construction should not be altered by referring to the parties' paramount intentions: *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 1 AC 655, [1992] 2 All ER 275, HL (although authorities on the point can be fairly narrowly decided one way or the other; and see *Overseas Containers (Finance) Ltd v Stoker (Inspector of Taxes)* [1989] 1 WLR 606, [1989] STC 364, CA (non-partnership case)); and see *Barclays Mercantile Industrial Finance Ltd v Melluish (Inspector of Taxes)* [1990] STC 314; *Stirling v Dietsmann Management Systems Ltd* [1991] IRLR 368, EAT; *Beutiland Co Ltd v IRC* [1991] STC 467, PC (non-partnership cases); and note 2. A partnership is a single 'trade' notwithstanding that it is carried on from several offices around the country, individual partners being assigned to a particular office: *C Connelly & Co v Wilbey (Inspector of Taxes)* [1992] STC 783. Professional league football is a 'trade': *Hall v Victoria Football League and Clarke* [1982] VR 64, Vict SC; and see *Kirkham v Williams (Inspector of Taxes)* [1991] 1 WLR 863, CA; and the guidance in *Marson (Inspector of Taxes) v Morton* [1986] 1 WLR 1343 (where the court held that, although each case depended upon its own facts, decided cases were nevertheless useful in determining whether a particular type of concern amounted to 'trade'). As to the type of considerations that apply when considering whether or not a particular venture is commercial or simply carried on for pleasure see *G B Turnbull Ltd v Customs and Excise Comrs* [1984] VATTR 247; and **COMPANIES** vol 14 (2009) PARA 1. Where an excise licence trade is carried on at any set of premises by two or more persons in partnership, then, subject to the provisions of any enactment relating to the licence or trade in question, not more than one licence is required to be held by those persons in respect of those premises at any one time: see the Customs and Excise Management Act 1979 s 101(3) (amended by the Finance Act 1986 s 8(6), Sch 5 para 1); and **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 622.

The expression 'business' would not appear to include an activity carried out solely for pleasure and without a motive for profit, even though 'guests' did make some financial contribution: *Customs and Excise Comrs v Lord Fisher* [1981] 2 All ER 147 (annual pheasant shoots held not subject to VAT); and see *Neuvalde Ltd v Customs and Excise Comrs* [1989] STC 395, CA (both non-partnership cases).

2 *R v Robson* (1885) 16 QBD 137 at 140, CCR, per Lord Coleridge CJ. Where the building activities, plant and equipment of a firm of builders and decorators was transferred to a limited company, and only the firm's land remained as a partnership asset but the firm continued to trade, it was decided that the land in question was held by the firm as trading stock, not (as the tax-payer argued) as merely a non-trading investment: *Watts (t/a A A Watts) v Hart (Inspector of Taxes)* [1984] STC 548; but see *Sugarwhite v Budd (Inspector of Taxes)* [1988] STC 533, CA (non-partnership case). As to joint adventures see PARA 12. Thus a so-called partnership for running

the Old Berkeley and other coaches was held not to be a partnership (*Goddard v Mills* (1929) Times, 16 February); and it is conceived that a shooting syndicate would not ordinarily be a partnership (see note 1).

3 See **CONTRACT** vol 9(1) (Reissue) PARA 765.

4 *Flemyng v Hector* (1836) 2 M & W 172 at 178-187; *Wise v Perpetual Trustee Co Ltd* [1903] AC 139 at 149, PC. See also **CLUBS** vol 13 (2009) PARAS 205, 213.

5 *Todd v Emly* (1841) 8 M & W 505; *Caldicott v Griffiths* (1853) 8 Exch 898.

6 *Brownlie v Russell* (1883) 8 App Cas 235, HL. As to building societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1856 et seq. As to friendly societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2081 et seq. Friendly societies are not partnerships within either the Partnership Act 1890 or the general acceptance of the term: see *Re Lead Co's Workmen's Fund Society*, *Lowes v Governor & Co for Smelting Down Lead with Pit and Sea Coal* [1904] 2 Ch 196, where the court disapproved the misuse of the term 'partnership' in *Lloyd v Loaring* (1802) 6 Ves 773; *Beaumont v Meredith* (1814) 3 Ves & B 180; and *Silver v Barnes* (1839) 6 Bing NC 180. A non-profit-making organisation was held to be carrying on a business within the meaning and for the purposes of its leasehold covenant against business user: *Florent v Horez* (1983) 48 P & CR 166, CA; and see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 501.

7 le under the old bankruptcy law.

8 *Price v Groom* (1848) 2 Exch 542 (trustees of deed for benefit of creditors); *Marconi's Wireless Telegraph Co Ltd v Newman* [1930] 2 KB 292 (inspector and committee under deed of inspectorship), following *Cox v Hickman* (1860) 8 HL Cas 268; *Redpath v Wigg* (1866) LR 1 Exch 335; and *Easterbrook v Barker* (1870) LR 6 CP 1. As to insolvent partnerships generally see PARAS 99, 233; **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 817 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1166-1301.

9 *Coates v Williams* (1852) 7 Exch 205, following *Janes v Whitbread* (1851) 11 CB 406.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(1) NATURE OF PARTNERSHIP/7. Firm name.

7. Firm name.

The name under which partners carry on business is their firm name¹. The firm name is not the name of a corporation but simply the name under which the partners carry on the joint business².

1 See the Partnership Act 1890 s 4(1); and PARA 1. The name of a newspaper is not a firm name (*De Bernales v New York Herald* [1893] 2 QB 97n), but a club name may be a firm name (*Firmin & Sons Ltd v International Club* (1889) 5 TLR 694, CA).

2 *Re Smith, Fleming & Co, ex p Harding* (1879) 12 ChD 557 at 567, CA. See also *Sadler v Whiteman* [1910] 1 KB 868 at 889, CA (on appeal [1910] AC 514, HL); and *R v Holden* [1912] 1 KB 483, CCA. A partner who has sold his share of goodwill to the other partner cannot restrain the continued use of his own name in connection with the business: *Totley v Kemp* (1970) 215 Estates Gazette 1021.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(1) NATURE OF PARTNERSHIP/8. Disclosure requirements under the Business Names Act 1985.

8. Disclosure requirements under the Business Names Act 1985.

Until a day to be appointed, the Business Names Act 1985 makes the following provision¹. Every partnership² carrying on business³ in Great Britain⁴ under a name which does not consist of the surnames⁵ of all partners who are individuals and the corporate names of all partners who are bodies corporate without any addition other than a permitted addition⁶ must state in legible characters on all business letters, written orders for goods or services to be supplied to the business, invoices and receipts issued in the course of the business and written demands for payment of debts arising in the course of the business, the name of each partner (and in the case of a limited liability partnership, its corporate name and the name of each member⁷) and an address in Great Britain at which service of any document relating in any way to the business will be effective⁸. The requirement so to state the name of each partner (or member, in the case of a limited liability partnership) does not, however, apply in relation to any document issued by a partnership of more than 20 persons which maintains at its principal place of business a list of the names of all the partners if none of the names of the partners appears in the document otherwise than in the text or as a signatory and the document states in legible characters the address of the partnership's principal place of business and that the list of the partners' names is open to inspection at that place⁹.

A partnership may not, without the written approval of the Secretary of State, carry on business in Great Britain under a name which would be likely to give the impression that the business is connected with Her Majesty's government, any part of the Scottish Administration, the Welsh Assembly Government or with any local authority or includes any word or expression for the time being specified in regulations¹⁰.

Failure to comply with the above provisions is a criminal offence¹¹; and breach of the statutory requirements as to disclosure¹² imposes a general disability on the firm¹³.

1 As from a day to be appointed, the Business Names Act 1985 is prospectively repealed by the Companies Act 2006 s 1295, Sch 16, and will be replaced by the Companies Act 2006 ss 1200-1208: see PARA 9. At the date at which this volume states the law, no such day had been appointed.

2 For these purposes, 'partnership' includes a foreign partnership: Business Names Act 1985 s 8(1) (prospectively repealed: see note 1).

3 For these purposes, 'business' includes a profession: Business Names Act 1985 s 8(1) (prospectively repealed: see note 1).

4 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706 preamble art 1; Interpretation Act 1978 s 22(1), Sch 2 para 5(a).

5 For these purposes, 'surname', in relation to a peer or person known by a British title different from his surname, means the title by which he is known: Business Names Act 1985 s 8(1) (prospectively repealed: see note 1).

6 It is an addition permitted by the Business Names Act 1985. The following are permitted additions: (1) the forenames of individual partners or the initials of those forenames or, where two or more individual partners have the same surname, the addition of 's' at the end of that surname; (2) any addition merely indicating that the business is carried on in succession to a former owner of the business: s 1(2)(a), (c) (prospectively repealed: see note 1). 'Initial' includes any recognised abbreviation of a name: s 8(1) (prospectively repealed: see note 1).

7 Business Names Act 1985 s 4(1)(a)(iiia) (added by SI 2001/1090) (prospectively repealed: see note 1). As to limited liability partnerships see PARA 234 et seq.

8 Business Names Act 1985 ss 1(1)(a), 4(1)(a)(i), (iv) (prospectively repealed: see note 1). A partnership must secure that the names and addresses required to be so stated on its business letters, or which would have been so required but for s 4(3) or s 4(3A) are immediately given by written notice to any person with whom anything is done or discussed in the course of the business and who asks for such names and addresses: s 4(2) (amended by SI 2001/1090) (prospectively repealed: see note 1).

As to business names generally see **COMPANIES** vol 14 (2009) PARA 223 et seq; **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 509.

9 Business Names Act 1985 s 4(3), (3A) (added by SI 2001/1090) (prospectively repealed: see note 1). Where a partnership maintains a list of the partners' names for the purposes of the Business Names Act 1985 s 4(3) or a limited liability partnership maintains a list of members' names for the purposes of s 4(3A), any person may inspect the list during office hours: s 4(4), (4A) (added by SI 2001/1090) (prospectively repealed: see note 1).

10 Business Names Act 1985 s 2(1) (amended by SI 1999/1820; SI 2007/1388) (prospectively repealed: see note 1). As to the regulations so made see **COMPANIES** vol 14 (2009) PARA 224; **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 509. The Business Names Act 1985 s 2(1) does not, however, apply to the carrying on of a business by a person to whom the business has been transferred on or after 26 February 1982 and who carries on the business under the name which was its lawful business name immediately before that transfer, during the period of 12 months beginning with the date of that transfer (s 2(2) (prospectively repealed: see note 1)); nor does s 2(1) apply to the carrying on of a business by a person who carried on that business immediately before 26 February 1982 and continues to carry it on under the name which immediately before that date was its lawful business name (s 2(3) (prospectively repealed: see note 1)). For these purposes, 'lawful business name', in relation to a business, means a name under which the business was carried on without contravening s 2(1) or the Registration of Business Names Act 1916 s 2 (repealed): Business Names Act 1985 s 8(1) (prospectively repealed: see note 1).

11 See the Business Names Act 1985 ss 2(4), 4(6), (7), 7 (prospectively repealed: see note 1); and **COMPANIES** vol 14 (2009) PARA 224; **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 509.

12 See the Business Names Act 1985 s 4(1) or s 4(2) (prospectively repealed: see note 1).

13 See the Business Names Act 1985 s 5 (prospectively repealed: see note 1); **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 509. The court does, however, have a residual discretion to waive this statutory disability: *Lawrence Vanger & Co v Company Developments (Property Division) Ltd* (1976) 244 Estates Gazette 43, CA (decided under the Registration of Business Names Act 1916 s 8(1)(a) (repealed)); and see *Buckmaster and Moore (a firm) v Fado Investment Ltd* [1986] PCC 95 (IOM HC) (a decision involving an English firm, albeit under corresponding Manx legislation).

UPDATE

8-9 Disclosure requirements under the Business Names Act 1985...Disclosure requirements under the Companies Act 2006

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(1) NATURE OF PARTNERSHIP/9. Disclosure requirements under the Companies Act 2006.

9. Disclosure requirements under the Companies Act 2006.

As from a day to be appointed, the Companies Act 2006 makes the following provision¹ where a partnership² is carrying on business³ in the United Kingdom under a business name⁴ (that is a name other than (1) the surnames⁵ of all partners who are individuals; and (2) the corporate names of all partners who are bodies corporate, in either case without any addition other than a permitted addition)⁶.

Such a partnership must state the name of each member of the partnership (and in relation to each person so named, an address in the United Kingdom at which service of any document relating in any way to the business will be effective) in legible characters, on all business letters, written orders for goods or services to be supplied to the business, invoices and receipts issued in the course of the business, and written demands for payment of debts arising in the course of the business⁷. However, there is an exemption from this requirement in respect of large partnerships so that this does not apply in relation to a document issued by a partnership of more than 20 persons if (a) the partnership maintains at its principal place of business a list of the names of all the partners; (b) no partner's name appears in the document, except in the text or as a signatory; and (c) the document states in legible characters the address of the partnership's principal place of business and that the list of the partners' names is open to inspection there⁸.

In any premises where the business is carried on, and to which customers of the business or suppliers of goods or services to the business have access, the partnership must display in a prominent position, so that it may easily be read by such customers or suppliers, a notice containing the required information⁹.

A person who without reasonable excuse fails to comply with the disclosure requirements in respect of business documents¹⁰ and business premises¹¹ commits an offence¹², and if it is committed by a body corporate, an offence is also committed by every officer of the body who is in default¹³.

Where any legal proceedings are brought by a partnership to enforce a right arising out of a contract made in the course of a business in respect of which the partners were, at the time the contract was made, in breach of the disclosure provisions¹⁴, the proceedings must be dismissed if the defendant shows (i) that he has a claim against the claimant arising out of the contract that he has been unable to pursue by reason of the latter's breach of the disclosure requirements¹⁵; or (ii) that he has suffered some financial loss in connection with the contract by reason of the claimant's breach of those requirements, unless the court is satisfied that it is just and equitable to permit the proceedings to continue¹⁶. However, this does not affect the right of any person to enforce such rights as he may have against another person in any proceedings brought by that person¹⁷.

1 At the date at which this volume states the law, the Companies Act 2006 ss 1200-1208 had only been brought into force to the extent necessary to exercise the power to make regulations: see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428 (appointing 20 January 2007 for this purpose). As to the current provisions in force under the Business Names Act 1985 see PARA 8.

2 'Partnership' means:

1 (1) a partnership within the Partnership Act 1890; or

- 2 (2) a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom: Companies Act 2006 s 1208 (not yet in force).
- 3 'Business' includes a profession: Companies Act 2006 s 1208 (not yet in force).
- 4 Companies Act 2006 s 1200(1) (not yet in force). 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. As to the meaning of 'Great Britain' see PARA 8 note 4. Neither the Isle of Man nor the Channel Islands are within the United Kingdom. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.
- 5 'Surname', in relation to a peer or person usually known by a British title different from his surname, means the title by which he is known: s 1208 (not yet in force).
- 6 Companies Act 2006 s 1200(2) (not yet in force). The following are the permitted additions for a partnership: (1) the forenames of individual partners or the initials of those forenames, or where two or more individual partners have the same surname, the addition of 's' at the end of that surname; (2) an addition merely indicating that the business is carried on in succession to a former owner of the business: s 1200(3) (not yet in force).
- 7 Companies Act 2006 ss 1201, 1202(1) (not yet in force). The partnership must secure that this information is immediately given, by written notice, to any person with whom anything is done or discussed in the course of the business and who asks for that information: s 1202(2) (not yet in force). The Secretary of State may by regulations (which are subject to negative resolution procedure) require that such notices be given in a specified form: s 1202(3), (4) (not yet in force).
- 8 Companies Act 2006 ss 1202(1), 1203(1), (2) (not yet in force). Where a partnership maintains a list of the partners' names for the purposes of s 1203 any person may inspect the list during office hours: s 1203(3) (not yet in force). Where an inspection required by a person in accordance with s 1203 is refused, an offence is committed by any member of the partnership concerned who without reasonable excuse refused the inspection or permitted it to be refused: s 1203(4) (not yet in force). A person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 1203(5) (not yet in force). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144.
- 9 Companies Act 2006 s 1204(1) (not yet in force). The required information is the name of each member of the partnership (and in relation to each person so named, an address in the United Kingdom at which service of any document relating in any way to the business will be effective): see s 1201 (not yet in force); and the text to note 7. The Secretary of State may by regulations (which are subject to negative resolution procedure) require that such notices be displayed in a specified form: s 1204(2), (3) (not yet in force).
- 10 Ie the Companies Act 2006 s 1202 and regulations made under it (see the text and note 7): s 1205(4) (not yet in force).
- 11 Ie the Companies Act 2006 s 1204 and regulations made under it (see the text and note 9): s 1205(4) (not yet in force).
- 12 Companies Act 2006 s 1205(1) (not yet in force). A person guilty of the offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 1205(3) (not yet in force).
- 13 Companies Act 2006 s 1205(2) (not yet in force).
- 14 Ie the Companies Act 2006 s 1202(1), (2) or s 1204(1) (not yet in force).
- 15 Ie the requirements of the Companies Act 2006 Pt 41 Ch 2 (ss 1200-1206) and the requirements of regulations made under it: s 1206(3) (not yet in force).
- 16 Companies Act 2006 s 1206(1), (2) (not yet in force).

17 Companies Act 2006 s 1206(4) (not yet in force).

UPDATE

8-9 Disclosure requirements under the Business Names Act 1985...Disclosure requirements under the Companies Act 2006

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

9 Disclosure requirements under the Companies Act 2006

TEXT AND NOTE 7--Companies Act 2006 s 1201 substituted: SI 2009/3182.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(i) Co-ownership of Property/10. Co-ownership and partnership distinguished.

(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS

(i) Co-ownership of Property

10. Co-ownership and partnership distinguished.

Joint tenancy, tenancy in common, joint property, common property or part ownership does not, of itself, create a partnership between the co-owners as to anything so held or owned, whether or not they share any profits made by the use of it¹. Whether co-owners are also partners is a question of evidence. The mode in which the property has been dealt with and divided and the way in which it and any consequent proceeds and income have been treated in the books may well prove important, because persons who are only co-owners keep books on a different footing from those who are also partners².

1 Partnership Act 1890 s 2(1). Thus co-owners of a racehorse who share equally the expenses of keeping, training and running the horse are not necessarily partners as regards the horse, although there may be a partnership between them in the business of running the horse for profit: *French v Styring* (1857) 2 CBNS 357 at 366; cf *Green v Briggs* (1848) 6 Hare 395.

2 See *Re Hulton, Hulton v Lister* (1890) 62 LT 200, CA. As to the partners' right to full accounts and information concerning the firm's affairs see PARA 135. As to the manner in which partnership accounts are framed see PARA 155.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(i) Co-ownership of Property/11. Co-owners of land.

11. Co-owners of land.

Co-owners of land who merely share the expenses of management and divide the income arising from their land in specified shares are not thereby constituted partners¹. Nor is it a partnership if two co-owners agree that one is to manage and provide funds for the repair of a house, and that the net rent is to be divided between them equally².

If, however, co-owners use their land or other property for the purpose of carrying on any business, they are partners as regards the business³, and prima facie, although not necessarily⁴, also as regards the property employed⁵. Thus, if land is bought by two persons with the object of improving and selling it in building lots, there may be a partnership between them as regards the land⁶; and a third person (for example a surveyor) who contributes skill and labour, but neither land nor money, may, if he is entitled to share in the profits, be a partner with them, especially if he shares losses as well as profits⁷. To constitute a partnership, the property of the co-owners must be employed in a business with the object of producing a return in the shape of profits or of adding to its value⁸.

1 See the Partnership Act 1890 s 2(1); and PARA 10.

2 *French v Styring* (1857) 2 CBNS 357 at 366 per Willes J. As to partnership land see PARA 118; and **SALE OF LAND** vol 42 (Reissue) PARA 281. As to trusts of land see the Trusts of Land and Appointment of Trustees Act 1996; and **TRUSTS**. As to the rule that partnership land is sold on dissolution see PARA 208.

3 Thus the working of a colliery of which the owners were tenants in common constituted a partnership between them as regards the business of the colliery: *Jefferys v Smith* (1820) 1 Jac & W 298; *Fereday v Wightwick* (1829) 1 Russ & M 45; *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629 at 637, CA. As to the respective rights enjoyed by co-owners of mines see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 366 et seq.

4 *Meyer v Sharpe* (1813) 5 Taunt 74; *Crawshay v Maule* (1818) 1 Swan 495 at 518; *French v Styring* (1857) 2 CBNS 357; *Davis v Davis* [1894] 1 Ch 393. The fact that the firm pays the rent of a lease which is in one partner's name, or that it has paid the stamp duty on the grant of the lease, is not conclusive evidence that the lease is partnership property: *Hodson v Cashmore* (1972) 226 Estates Gazette 1203. As to which assets may or may not constitute partnership property generally see PARA 116 et seq. If a firm becomes incorporated, then, by transferring its assets to the newly incorporated company, it may be in breach of a covenant in its lease against parting with possession of the leasehold property which it occupies: *Lam Kee Ying Sdn Bhd v Lam Shes Tong (t/a Lian Joo Co)* [1975] AC 247, [1974] 3 All ER 137, PC; but see *Harrison v Povey, London County Freehold and Leasehold Properties Ltd v Harrison and Povey* (1956) 168 Estates Gazette 613, CA (where it was held that the tenant partner who had left the premises from which the firm traded and had set up his own business elsewhere leaving his co-partner in possession had not parted with possession of the leased premises and was not therefore in breach of the terms of the lease). See also *Bristol Corp v Westcott* (1879) 12 ChD 461, CA; *Gian Singh & Co v Devraj Nahar* [1965] 1 All ER 768, [1965] 1 WLR 412, PC; and see *Varley v Coppard* (1872) LR 7 CP 505; *Langton v Henson* (1905) 92 LT 805; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 482.

5 *Forster v Hale* (1798) 3 Ves 696; affd (1800) 5 Ves 308 at 309. If a partnership in a colliery was found to exist, the property necessary for the purposes of that partnership was, by operation of law, held for the purposes of the partnership: *Waterer v Waterer* (1873) LR 15 Eq 402; *Syers v Syers* (1876) 1 App Cas 174, HL; *Davies v Games* (1879) 12 ChD 813; and see *Jardine-Paterson v Fraser* 1974 SLT 93.

6 *Dale v Hamilton* (1846) 5 Hare 369 at 393 (on appeal (1847) 2 Ph 266); *Darby v Darby* (1856) 3 Drew 495; *Re Hulton, Hulton v Lister* (1890) 62 LT 200, CA.

7 *Moore v Davis* (1879) 11 ChD 261 at 265.

8 *Kay v Johnston* (1856) 21 Beav 536 at 537; cf *Re Leslie, Leslie v French* (1883) 23 ChD 552; *Leigh v Dickeson* (1883) 12 QBD 194 (affd (1884) 15 QBD 60, CA); *Robinson v Ashton, Ashton v Robinson* (1875) LR 20 Eq 25; and see PARA 6.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(i) Co-ownership of Property/12. Joint adventure.

12. Joint adventure.

If two persons jointly export their individual goods for sale as a joint adventure, dividing the profits of the transaction in specified shares, there is no partnership as regards the separate parcel of goods provided by each until they are brought into the common stock¹. Conversely, if they are jointly concerned in the purchase, they are not partners unless they are also jointly concerned in the future sale². Where, however, they agree to embark in a joint adventure for the purchase and sale of goods, there is a partnership as regards all the goods bought in pursuance of the agreement, and each is liable for the price of the goods bought by the other³; and, if goods bought for a joint adventure by two persons are wholly paid for by one of them, while the other contributes skill and labour in return for a share of the profits, there may be a partnership between them of such a nature that the goods are partnership property⁴. Similarly, if a sole patentee and a financier who supplies the necessary funds work a patent in partnership for four years and are advertised as joint patentees, the patent may become partnership property⁵. A wife who actively helps her husband in a business but receives no wages can be a partner in a joint enterprise⁶.

1 *Reid v Hollinshed* (1825) 7 Dow & Ry KB 444; *Alexander v Long* (1884) 1 TLR 145.

2 *Coope v Eyre* (1788) 1 Hy Bl 37 at 49 per Lord Loughborough CJ (where the property purchased was to be divided); cf *Hoare v Dawes* (1780) 1 Doug KB 371; *Gibson v Lupton* (1832) 9 Bing 297.

3 *Gouthwaite v Duckworth* (1810) 12 East 421, followed and applied in *Karmali Abdulla Allarakhia v Vora Karimji Jiwanji* (1914) LR 42 Ind App 48, PC, where *Saville v Robertson* (1792) 4 Term Rep 720 was distinguished.

4 *Reid v Hollinshed* (1825) 7 Dow & Ry KB 444; *Alexander v Long* (1884) 1 TLR 145.

5 *Kenny's Patent Button-Holeing Co Ltd v Somervell and Lutwyche* (1878) 38 LT 878.

6 *Nixon v Nixon* [1969] 3 All ER 1133, [1969] 1 WLR 1676, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(i) Co-ownership of Property/13. Partnership without joint ownership.

13. Partnership without joint ownership.

Persons may be partners, either generally or in some particular business or isolated transaction, even though all or part of the property used for the purposes of that business transaction may not be the subject of joint ownership but may belong to some or one of them individually¹.

¹ Thus, where two persons carried on the business of running a stage coach or a stage wagon, each supplying his own horses for part of the journey and dividing the profits according to the mileage worked by their teams, they were held to be partners: *Fromont v Coupland* (1824) 2 Bing 170 (all the fares received by one partner, who accounted to the other); *Russell v Austwick* (1826) 1 Sim 52 (each received the fares earned in his district and accounted to the other, but there was no partnership as regards the horses, and therefore one partner was not liable for goods supplied to the other for the use of the horses which were his separate property). See also *Barton v Hanson* (1809) 2 Taunt 49; cf *Wilson v Whitehead* (1842) 10 M & W 503; *Osborne v Jullion* (1856) 3 Drew 596; *Moore v Davis* (1879) 11 ChD 261 at 265; and the cases cited in PARA 119.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(ii) Sharing Gross Returns/14. Sharing of gross returns not prima facie evidence of partnership.

(ii) Sharing Gross Returns

14. Sharing of gross returns not prima facie evidence of partnership.

The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived¹. The receipt of a share of gross returns, as distinguished from the receipt of a share of profits, is not even prima facie evidence of partnership². Even where the expenses are jointly borne, the same rules seem to apply³.

¹ Partnership Act 1890 s 2(2); and see *Lyon v Knowles* (1863) 3 B & S 556 at 564; affd (1864) 5 B & S 751, Ex Ch.

² Cf the Partnership Act 1890 s 2(3); and see PARA 15 et seq. As to the effect of association of promoters of a company see PARA 1. If one of two joint owners of a ship takes the exclusive management of it, bearing all the expenses, and pays one-third of the gross earnings to the other joint owner, the joint owners are not partners: *Burnard v Aaron and Sharpley* (1862) 31 LJCP 334; distinguished on another point in *Associated Portland Cement Manufacturers (1910) Ltd v Ashton* [1915] 2 KB 1, CA (owner and master). If a ship belongs to one person and is worked by another who receives one-half of the gross earnings, these persons are not partners: *Dry v Boswell* (1808) 1 Camp 329. Cf *Wish v Small* (1808) 1 Camp 331n (share of profits held to represent rent for pasturage of cattle). In both cases, if the net profits had been shared, the parties would have been partners: see PARA 15.

³ *French v Styring* (1857) 2 CBNS 357 (two joint owners of a racehorse shared the gross winnings, the horse being kept, trained and run by one only, but the expenses of keeping, training and running it were borne by them jointly). See also PARA 10. The owner of a theatre who pays certain outgoings and receives one-half of the gross receipts of public performances given by the occupier is not a partner, at any rate if the management is in the hands of the occupier: *Lyon v Knowles* (1863) 3 B & S 556; affd (1864) 5 B & S 751, Ex Ch. For an example of how persons trading together as partners may agree between themselves the manner in which unusual expenses should be borne and shown in their annual accounts see *MacKinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co (a firm)* [1990] 2 AC 239, [1990] 1 All ER 45, HL (decided under the Income and Corporation Taxes Act 1970 s 130 (a) (repealed): see now the Income and Corporation Taxes Act 1988 s 74; and **INCOME TAXATION** vol 23(1) (Reissue) PARA 181 et seq), although, as that case shows, whether unusual expenses are deductible against profits depends on the 'wholly and exclusively' test. As to taxation generally see PARA 100 et seq. As to the partners' right to see the accounts and books of their firm see PARA 135; and as to the basis upon which accounts are framed see PARA 155.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iii) Sharing Profits/15. Sharing profits as evidence of partnership.

(iii) Sharing Profits

15. Sharing profits as evidence of partnership.

The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business¹. If the matter stops there, it is evidence upon which the court must act², but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business³. The question is whether the business is conducted so as to constitute the relationship of principal and agent between the person taking the profits and those actually carrying on the business⁴. The terms of the arrangement between the parties must be fairly considered as a whole; and, if the receipt of profits is only one of such terms, it is not conclusive, and the court will give effect to the entire arrangement⁵. What has to be considered is what rights the contract has given to one of the parties as against the other⁶. The division of profits need not, however, reflect the actual contribution that each partner makes to the business⁷.

Whilst share of profits constitutes prima facie evidence of partnership, it is not definitive in itself; it is possible, for example, for a person to be a partner in a firm if he and the other partners agreed that, rather than being entitled to participate in the firm's profits, he should be paid a specified sum by the firm, irrespective of profits, for work to be done by him on its behalf⁸.

1 Partnership Act 1890 s 2(3). See *Parker v Walker* 1961 SLT 252, SC (share-fishing); *Rush and Tomkins Construction Ltd v Vieweger Construction Co Ltd* (1964) 45 DLR (2d) 122, Alta SC; revsd on another point [1965] SCR 195, 48 DLR (2d) 509, Can SC (contractors and engineers together constructing highway and sharing profits).

In this context, the term 'business' relates not merely to a life-long or a universal business or a long undertaking, but to any separate commercial adventure in which people may embark: *Re Abenheim, ex p Abenheim* (1913) 109 LT 219.

2 *Davis v Davis* [1894] 1 Ch 393 at 399 per North J; *Walker West Developments Ltd v F J Emmett Ltd* (1978) 252 Estates Gazette 1171, CA (developers and builders sharing profits but not losses held to be partners).

3 Partnership Act 1890 s 2(3). The Partnership Act 1890, which repeals but substantially re-enacts 28 & 29 Vict c 86 (Partnership) ('Bovill's Act') (1865) declares and settles the law according pre-existing rules of equity and common law: Partnership Act 1890 s 46; and see *Strathearn Gordon Associates Ltd v Customs and Excise Comrs* [1985] VATTR 79 (the fact that a company participating in property developments provided property management services in exchange for a share of profit, did not convert what was prima facie remuneration for the supply of services into a partnership).

4 *Bullen v Sharp* (1865) LR 1 CP 86 at 112, Ex Ch, per Blackburn J. See also *Cox v Hickman* (1860) 8 HL Cas 268 at 304, 312; *Re English and Irish Church and University Assurance Society (No 2)* (1863) 1 Hem & M 85; *Kilshaw v Jukes* (1863) 3 B & S 847; *Shaw v Galt* (1864) 16 ICLR 357 at 375; *Holme v Hammond* (1872) LR 7 Exch 218.

5 *Davis v Davis* [1894] 1 Ch 393.

6 *Walker v Hirsch* (1884) 27 ChD 460 at 468, CA, per Cotton LJ; and at 470, 471, doubting *Pawsey v Armstrong* (1881) 18 ChD 698. 'The question is what is the true construction of the document and what are the rights arising from it': *Davis v Davis* [1894] 1 Ch 393 at 472 per Lindley LJ. See also *Ross v Parkyns* (1875) LR 20 Eq 331; *London Financial Association v Kelk* (1884) 26 ChD 107 at 143; *White & Co v Churchyard* (1887) 3 TLR 428; *Badeley v Consolidated Bank* (1888) 38 ChD 238 at 258, 263, CA; *Re Young, ex p Jones* [1896] 2 QB 484;

Re Jane, ex p Trustee (1914) 110 LT 556, CA; *Re Beard & Co, ex p Trustee* [1915] HBR 191 at 200, CA, per Cozens Hardy MR.

7 *Ward v Newalls Insulation Co Ltd* [1998] 2 All ER 690, [1998] 1 WLR 1722, CA.

8 *M Young Legal Associates Ltd v Zahid Solicitors (a firm)* [2006] EWCA Civ 613, [2006] 1 WLR 2562, [2006] All ER (D) 227 (May).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iii) Sharing Profits/16. Sharing profits and losses.

16. Sharing profits and losses.

If losses as well as profits are shared, the presumption of partnership is stronger¹. This is so even if the agreement stipulates that each party is to bear only an aliquot share of loss². The fact that losses are shared is not, however, conclusive as to the existence of a partnership³.

There is no joint ownership, and no partnership, where each of several joint adventurers supplies separate parcels of goods which are to be sold, and the profits are divided rateably among them⁴, or where one person buys and pays for the goods and the profit or loss is to be shared by himself and another⁵. To constitute a partnership the parties must be jointly interested in the purchase and also jointly interested in the future sale⁶.

1 *Green v Beesley* (1835) 2 Bing NC 108; *Brett v Beckwith* (1856) 26 LJ Ch 130; *Noakes v Barlow* (1872) 26 LT 136, Ex Ch.

2 *Brown v Tapscott* (1840) 6 M & W 119; *McInroy v Hargrove* (1867) 15 WR 777.

3 *Walker v Hirsch* (1884) 27 ChD 460, CA. See also *Sutton & Co v Grey* [1894] 1 QB 285, CA; and see PARA 4 note 1.

4 *Heap v Dobson* (1863) 15 CBNS 460. See PARA 12.

5 *Alfaro v De la Torre* (1876) 24 WR 510; cf *Reid v Hollinshead* (1825) 4 B & C 867 (both parties interested in both the purchase and sale, although one found all the money and the other gave his time and skill).

6 *Hoare v Dawes* (1780) 1 Doug KB 371; cf *Coope v Eyre* (1788) 1 Hy Bl 37; *Gibson v Lupton* (1832) 9 Bing 297. As to whether a fisherman who shares profits is a partner see *Parker v Walker* 1961 SLT 252, SC.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iii) Sharing Profits/17. Persons having too indirect an interest in profits to be partners.

17. Persons having too indirect an interest in profits to be partners.

A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such¹. The true test of whether a partnership was intended is whether there was a joint business or whether the parties were intending to carry on the business as the agents of each other². Similarly, the widow, widower, surviving civil partner or child of a deceased partner, receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such³.

1 Partnership Act 1890 s 2(3)(e) (re-enacting 28 & 29 Vict c 86 (Partnership) ('Bovill's Act') (1865) s 4).

2 *Hawksley v Outram* [1892] 3 Ch 359 at 377, CA, per Lopes LJ (vendors were entitled to receive a share of profits in respect of purchase money left in the business, but the agreement as a whole was inconsistent with the inference that the purchasers were carrying on the business on behalf of themselves and the vendors); cf *Chitty v Boorman* (1890) 7 TLR 43; *Pratt v Strick* (1932) 17 TC 459 (vendor of a medical practice covenanted to introduce the purchaser to his patients and to assist him in the practice for a period during which the earnings and expenses should belong to, and be borne by, them equally; there was held to be no partnership between them during that period); cf *Rawlinson v Clarke* (1846) 15 M & W 292, Ex Ch.

3 Partnership Act 1890 s 2(3)(c) (amended by the Civil Partnership Act 2004 s 26(1), Sch 27 para 2) (re-enacting 28 & 29 Vict c 86 (Partnership) ('Bovill's Act') (1865) s 3: see further PARA 15 note 3); *Re Jones, ex p Harper* (1857) 1 De G & J 180.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iii) Sharing Profits/18. Salaried partners and employees.

18. Salaried partners and employees.

A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such¹. The expression 'salaried partner' is not a term of art, but is generally used to mean a person who receives a fixed remuneration irrespective of profits and who is held out to the world to be a partner². The partnership will then be bound by his acts whether or not he is actually a partner. His salary may be a charge on the profits³. Where a person receives both salary and a share of the profits, it may be evidence that he is an employee rather than a partner⁴. However, an agreement for a person to be paid a specified sum for work to be done by him on behalf of a firm does not necessarily preclude his thereby becoming a partner of it⁵.

A former partner may be employed by the partnership business as an employee rather than as a partner⁶. An employee⁷ of a firm may be entitled to sue for wrongful dismissal if the firm is dissolved⁸.

If an employee or agent also bears losses, he may be a partner⁹. If his agreement gives him rights usually given to a partner or contains provisions applicable to a partner, for example that he is not to pledge the other's credit, the inference of partnership is conclusive¹⁰.

1 Partnership Act 1890 s 2(3)(b). See *Benjamin v Porteus* (1796) 2 Hy Bl 590 (explained in *Re Nevill, ex p White* (1871) 6 Ch App 397 at 404, 405 per Mellish LJ); *R v Holmes* (1811) 2 Lew CC 256; *Meyer v Sharpe* (1813) 5 Taunt 74; *Burnell v Hunt* (1841) 5 Jur 650; *Re Closson, ex p Harris* (1845) De G 165; *Pott v Eyton and Jones* (1846) 3 CB 32; *Rawlinson v Clarke* (1846) 15 M & W 292 at 302, Ex Ch (followed and applied in *Pratt v Strick* (1932) 17 TC 459); *Re Ellins, ex p Hickin* (1850) 3 De G & Sm 662; *Stocker v Brockelbank* (1851) 3 Mac & G 250; *Andrews v Pugh* (1854) 24 LJ Ch 58; *Edmundson v Thompson and Blakey* (1861) 31 LJ Ex 207; *Walker v Hirsch* (1884) 27 ChD 460, CA (disapproving *Pawsey v Armstrong* (1881) 18 ChD 698). Nor, on the application by a creditor to wind up the partnership, will the fact that a person allows himself to be held out as a partner confer jurisdiction by estoppel on a court where no partnership in fact exists: *Re C & M Ashberg* (1990) Times, 17 July. A salaried partner may be liable to account to the partners of the firm for profits that he received from his appointment as liquidator or receiver carried out whilst employed by the firm: *Casson Beckman & Partners v Papi* [1991] BCC 68, CA (although this case does not concern a salaried partner's liability to third parties qua partner but only his duties qua employee, it does show that such an employee's liability may actually mirror that owing as between partners); and see *Clarke v Newland* [1991] 1 All ER 397, CA.

2 *Stekel v Ellice* [1973] 1 All ER 465, [1973] 1 WLR 191. See also *Turnock v Taylor* (1961) 180 Estates Gazette 773, CA.

3 *Marsh v Stacey* (1963) 107 Sol Jo 512, CA.

4 *Ross v Parkyns* (1875) LR 20 Eq 331 at 336.

5 *M Young Legal Associates Ltd v Zahid Solicitors (a firm)* [2006] EWCA Civ 613, [2006] 1 WLR 2562, [2006] All ER (D) 227 (May).

6 *Easdown v Cobb* [1940] 1 All ER 49, HL. See further **EMPLOYMENT** vol 39 (2009) PARA 6.

7 But not a partner: *Cowell v Quilter Goodison & Co Ltd and QG Management Services Ltd* [1989] IRLR 392, CA.

8 *Tunstall v Condon* [1980] ICR 786, EAT; cf *Burgess v O'Brien* (1966) 1 KIR 99, ITR 164. In each case, however, the precise terms of the contract of employment in question must be examined: see *Brace v Calder* [1895] 2 QB 253, CA; *Phillips v Alhambra Palace Co* [1901] 1 KB 59. It is, however, submitted that, where upon the dissolution of the firm a full-scale winding up and sale of the partnership assets takes effect (see PARA 206 et

seq), such termination of employees' contracts of employment will not occur in practice until the winding up has been completed, *sed quaere*; in *Tunstall v Condon* it had been agreed that after dissolution each of the two partners should simply keep his office from which to carry on in business on his own account. Further, if the dissolution is merely a technical one (ie caused solely by a change in the identity of the partners without a consequent winding up) it is unlikely that such a dissolution would entitle employees to sue for wrongful dismissal: see the Employment Rights Act 1996; the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246; *Tunstall v Condon* at 791; *Allen & Son v Coventry* [1980] ICR 9, EAT (where one of two partners in a firm of solicitors had transferred his 70% interest in the firm to the continuing partner); and **EMPLOYMENT** vol 40 (2009) PARA 683 et seq. See also *Secretary of State for Employment v Spence* [1987] QB 179, [1986] 3 All ER 616, CA. Furthermore, if a partnership is dissolved and the business is subsequently transferred as a going concern, it is doubtful whether the Employment Rights Act 1996 and the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246, will apply to its employees since their contracts of employment would already have been terminated by the prior dissolution; *sed quaere*. Where a partner subsequently becomes an employee, he may have difficulty in proving the requisite continuity of employment (see *Cowell v Quilter Goodison & Co Ltd and QG Management Services Ltd* [1989] IRLR 392, CA); and, where an employee's contract of employment has been terminated by the dissolution of the partnership, he may be entitled to practise in what would *prima facie* have been contravention of a covenant in restraint of trade contained in his contract of employment (*Briggs v Oates* [1991] 1 All ER 407).

9 *Smith v Watson* (1824) 2 B & C 401; *Reid v Hollinshead* (1825) 4 B & C 867. Cf *Walker v Hirsch* (1884) 27 ChD 460, CA. It does not follow that he cannot be a partner without sharing losses: see PARA 4 note 1; and PARA 16.

10 *Pole v Leask* (1863) 9 Jur NS 829, HL; *Moore v Davis* (1879) 11 ChD 261.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iii) Sharing Profits/19. Receipt of debt out of profits.

19. Receipt of debt out of profits.

The receipt by a person of a debt or other liquidated amount, by instalments or otherwise, out of the accruing profits of a business does not of itself make him a partner in the business or liable as such¹.

¹ Partnership Act 1890 s 2(3)(a) (which extended the law to agreements not touched by 28 & 29 Vict c 86 (Partnership) ('Bovill's Act') (1865): see PARA 15 note 3).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iii) Sharing Profits/20. Share of profits as interest on loan.

20. Share of profits as interest on loan.

The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender is to receive a rate of interest varying with the profits, or is to receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such, provided that the contract is in writing and signed by or on behalf of all the parties to it¹. It is immaterial whether the amount payable as interest increases or decreases, or whether a maximum rate is fixed which is liable only to decrease in proportion to the profits, if the agreement to that effect is clear².

If the lender leaves the debt on deposit at interest and upon the further term that he is to be credited with a share of profits, he is not a partner and may prove as an ordinary creditor³.

The fact that the lender has an option to become a partner⁴ or to require his nominee to be taken into partnership within a specified period does not make him a partner⁵.

1 Partnership Act 1890 s 2(3)(d). See *Re Whittaker, ex p Macmillan* (1871) 24 LT 143; *Re Howard, ex p Tennant* (1877) 6 ChD 303, CA; *Re Young, ex p Jones* [1896] 2 QB 484. Thus, a person who agrees to pay to a business firm money to be used in buying goods for the business in consideration of a fixed rate of interest and a share of the profits of a specified branch of the business may not be a partner (*Meyer v Schacher* (1878) 38 LT 97), but such an agreement may constitute a breach of a covenant by the lender with his partners not to engage directly or indirectly in any other business (*Cooper v Page* (1876) 34 LT 90). It has been suggested that, if there is no agreement in writing, the intending lender must be regarded as a partner (*Re Fort, ex p Schofield* [1897] 2 QB 495 at 501, CA, per A L Smith LJ); but this dictum has not yet received authoritative confirmation, and the question would appear to depend upon the real intention of the parties. As to the necessity for the agreement to be in writing see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 155 et seq.

2 *Re Vince, ex p Trustee in Bankruptcy* [1892] 1 QB 587.

3 *Re Pinto Leite & Nephews, ex p Visconde des Olivaes* [1929] 1 Ch 221. As to the position of the lender in the bankruptcy of the borrower see **BANKRUPTCY AND INSOLVENCY** vol 3(2) (2002 Reissue) PARA 587.

4 *Re Vanderplank, ex p Turquand* (1841) 2 Mont D & De G 339.

5 *Re Harris, ex p Davis* (1863) 4 De GJ & Sm 523. See PARA 21.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iii) Sharing Profits/21. When a lender is a partner.

21. When a lender is a partner.

The effect of an advance in consideration of a share of profits may easily be to place the intending lender in the position of a partner with all its consequences and liabilities¹, even though this may not be the intention of the parties and though the agreement may contain an express declaration to the contrary². If the agreement gives the supposed lender the rights and privileges of a partner³, no device or contrivance will enable him to escape the liabilities of a partner⁴. If he is not a partner, he is merely a creditor whose rights are limited by statute⁵. A lender may, however, stipulate for large powers, some of which might be consistent with the position either of a creditor or a sleeping partner, and, if such powers are reasonably necessary for the protection of his interest as a lender, they will not be held to make him a partner⁶.

1 *Syers v Syers* (1876) 1 App Cas 174, HL.

2 *Re Megevand, ex p Delhasse* (1878) 7 ChD 511, CA.

3 *Debenham v Phillips* (1887) 3 TLR 512; *Badeley v Consolidated Bank* (1888) 38 ChD 238, CA.

4 'If a partnership in fact exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit and loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction from being adjudged to be a partnership': *Adam v Newbigging* (1888) 13 App Cas 308 at 315, HL, per Lord Halsbury LC. See also *Pooley v Driver* (1876) 5 ChD 458; cf *Courtenay v Wagstaff* (1864) 16 CBNS 110; *Re Megevand, ex p Delhasse* (1878) 7 ChD 511, CA; *Frowde v Williams* (1886) 56 LJB 62, DC; *Stewart v Buchanan* (1903) 6 F (Ct of Sess) 15; *Fenston v Johnstone* (1940) 23 TC 29.

5 *Re Howard, ex p Tennant* (1877) 6 ChD 303, CA; *Kelly v Scotto* (1880) 49 LJ Ch 383; *Iggesunds Bruk Akt v Von Dadelszen* (1887) 3 TLR 517, CA. See also **BANKRUPTCY AND INSOLVENCY** vol 3(2) (2002 Reissue) PARA 587.

6 *Hollom v Whichelow* (1895) 64 LJB 170.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iii) Sharing Profits/22. Lender is postponed to ordinary creditors.

22. Lender is postponed to ordinary creditors.

A lender who receives a rate of interest varying with the profits of a business, or a share of the profits of a business carried on by the borrower¹, cannot prove in competition with creditors for value in the bankruptcy or insolvency of the borrower², whether the agreement is written or oral³. However, if the agreement is vague and unintelligible, it may be void for uncertainty, in which case the lender may prove as an ordinary creditor⁴.

1 See PARA 21.

2 See the Partnership Act 1890 s 3; *Re Mason, ex p Bing* [1899] 1 QB 810 (where the loan to a firm was continued to the surviving partner); and **BANKRUPTCY AND INSOLVENCY** vol 3(2) (2002 Reissue) PARA 587.

3 *Re Fort, ex p Schofield* [1897] 2 QB 495, CA.

4 *Re Vince, ex p Baxter* [1892] 2 QB 478, CA; cf *Re Fort, ex p Schofield* [1897] 2 QB 495, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iii) Sharing Profits/23. Vendor of goodwill who takes a share of profits.

23. Vendor of goodwill who takes a share of profits.

A vendor of the goodwill of a business in consideration of a share of profits cannot prove in the bankruptcy or insolvency of the buyer in competition with the creditors for value¹.

¹ See the Partnership Act 1890 s 3; and **BANKRUPTCY AND INSOLVENCY** vol 3(2) (2002 Reissue) PARA 587. As to the disposal of goodwill on the dissolution of a partnership see PARA 213.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iv) Holding out as Partners/24. Liability arising from holding out or representation.

(iv) Holding out as Partners

24. Liability arising from holding out or representation.

Anyone who represents himself, or knowingly¹ allows himself to be represented, as a partner may be liable as a partner to third persons² and for partnership taxation³. He is liable to anyone who on the faith of any such representation has given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made⁴. Each partner is the agent of the others to make contracts on behalf of the firm⁵. Therefore, the members of the firm are liable as though they were actually partners with, and therefore the agents of, a person who holds himself out as a partner⁶. The liability depends upon the inducement by the representation of a dealing with the firm, so that it will not extend to negligent driving or similar torts⁷. He is estopped from denying the truth of such representation, and is therefore subject to the same liabilities as if he were, in fact, a partner⁸, even though he contributes neither capital nor labour, and has no interest in the profits of the business, or is indemnified against all possibility of loss⁹, and even if he is employed in it merely as a clerk or servant¹⁰, or, having been a partner, has retired without giving proper notice of that fact¹¹.

A representation that a person is willing or intends to become a partner is not enough; and persons to whom it is made ought to inquire whether he subsequently became a partner¹².

1 Negligence or carelessness in suffering the representation to be made is not enough to found liability: see *Tower Cabinet Co Ltd v Ingram* [1949] 2 KB 397, [1949] 1 All ER 1033, DC.

2 Partnership Act 1890 s 14(1). See *Nationwide Building Society v Lewis* [1998] Ch 482, [1998] 3 All ER 143, CA (a salaried partner in firm of solicitors who had been held out as a partner cannot be held liable for the firm's negligence in the absence of direct evidence of reliance on that holding out). As to salaried partners see further PARA 18.

3 *Peter v Customs and Excise Comrs* Man/76/88 (unreported) (person estopped from denying that he was a partner for the purpose of assessment to VAT). The fact that a person allows himself to be held out as a partner cannot, however, confer jurisdiction on the court by estoppel so as to enable it to order that a non-partnership business be wound up as though it were a partnership: *Re C & M Ashberg* (1990) Times, 17 July.

4 Partnership Act 1890 s 14(1); and see PARA 26. 'There can be no doubt that persons may be partners towards the world and yet not be partners as between themselves': *Re Stanton Iron Co* (1855) 21 Beav 164 at 169 per Romilly MR. See also *Jacobsen v Hennekenius* (1714) 5 Bro Parl Cas 482, HL; *Waugh v Carver* (1793) 2 Hy Bl 235 at 246; *Mulford v Griffin* (1858) 1 F & F 145. As to estoppel by representation see **ESTOPPEL** vol 16(2) (Reissue) PARA 1052 et seq.

5 See PARA 45 et seq. As to agency generally see **AGENCY**.

6 *Reynell v Lewis*, *Wyld v Hopkins* (1846) 15 M & W 517 at 527. The juridical basis for this liability is, however, unclear: see *Hudgell Yeates & Co v Watson* [1978] QB 451 at 467, [1978] 2 All ER 363 at 372, 373, CA, per Waller LJ.

7 *Smith v Bailey* [1891] 2 QB 403, CA, disapproving *Stables v Eley* (1825) 1 C & P 614; and see **TORT** vol 97 (2010) PARA 401 et seq. As to the ordinary liability of partners for torts see PARAS 65 et seq, 75.

8 The doctrine of holding out is a branch of the doctrine of estoppel: see *Re Fraser, ex p Central Bank of London* [1892] 2 QB 633 at 637, CA, per Lord Esher MR. See also *Mollwo, March & Co v Court of Wards* (1872)

LR 4 PC 419 at 435 per Sir Montagu Smith; and **ESTOPPEL** vol 16(2) (Reissue) PARA 1069 et seq. Cf *Glossop v Colman* (1815) 1 Stark 25.

9 *Waugh v Carver* (1793) 2 Hy Bl 235 at 246; *Bond v Pittard* (1838) 3 M & W 357.

10 *Peacock v Peacock* (1809) 2 Camp 45; *Ex p Watson* (1815) 19 Ves 459 at 461; *Kirkwood v Cheetham* (1862) 2 F & F 798; cf *Cornelius v Harrison* (1862) 2 F & F 758; *Hardman v Booth* (1863) 1 H & C 803.

11 See PARAS 27, 77 et seq.

12 *Bourne v Freeth* (1829) 9 B & C 632; cf *Reynell v Lewis*, *Wyld v Hopkins* (1846) 15 M & W 517 at 529; and see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 705.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iv) Holding out as Partners/25. Who may enforce liability arising from representation.

25. Who may enforce liability arising from representation.

The estoppel¹ can only be relied upon, and the liability be enforced, by persons to whom the representation of partnership has been made and who have acted upon the faith of it². A representation subsequent to the transaction sued upon is not enough to fix liability on the quasi-partner³; and a representation limited to a particular concern or class of business may not constitute a general representation so as to create liability in matters not connected with that particular concern or class of business⁴. A general representation to the public is not sufficient unless the person giving credit heard of it and acted upon it⁵.

1 le the estoppel from denying the truth of a representation of partnership: see PARA 24; and **ESTOPPEL**.

2 *Re Fraser, ex p Central Bank of London* [1892] 2 QB 633 at 637, CA. See also *M'Iver v Humble* (1812) 16 East 169 at 174; *Lloyd v Ashby* (1825) 2 C & P 138; *Carter v Whalley* (1830) 1 B & Ad 11 at 14.

3 *Baird v Planque* (1858) 1 F & F 344.

4 *De Berkomp v Smith and Lewis* (1793) 1 Esp 29.

5 *Ford v Whitmarsh* (1840) H & W 53. 'Each case of this nature must depend on its own circumstances with reference to the effect of the defendant's language and conduct on the plaintiff's mind': *Lake v Duke of Argyll* (1844) 6 QB 477 at 480. See also *Wood v Duke of Argyll* (1844) 6 Man & G 928.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iv) Holding out as Partners/26. Modes of holding out.

26. Modes of holding out.

The representation of partnership may be made or communicated either by words, spoken or written, or by conduct¹; and may be so made or communicated either by the quasi-partner or by a third person². In the latter case, the supposed partner is not bound unless the representation has been made with his knowledge and assent³; but, if he has himself made, or expressly or impliedly authorised, such a representation, he is liable even though he may not know that it has been communicated to the person who has acted upon it⁴. In the case of a representation by a third person, it is sufficient if the quasi-partner has been so described as to be clearly identified, even if his name has not been mentioned and may even have been refused⁵.

To constitute representation by conduct the acts relied upon must not be ambiguous⁶. A former partner is not held out as a partner merely by the continued use by the firm from which he has retired of a firm name consisting of his surname with the addition of the words '& Co'⁷.

1 Partnership Act 1890 s 14(1).

2 *Dickinson v Valpy* (1829) 10 B & C 128 at 140, 141; *Martyn v Gray* (1863) 14 CBNS 824 at 839. See also *Walter v Ashton* [1902] 2 Ch 282 (cycles advertised as 'Times cycles'). As to the general distinction between statements of intention and representations of fact see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 705 et seq.

3 *Fox v Clifton* (1830) 6 Bing 776 at 794. Assent will bind him, even though it was obtained by promises of irresponsibility or by misrepresentation, if the person to whom he was held out was not a party to such promises or misrepresentation: *Ellis v Schmoeck* (1829) 5 Bing 521; *Collingwood v Berkeley* (1863) 15 CBNS 145; *Maddick v Marshall* (1863) 16 CBNS 387 (affd (1864) 17 CBNS 829, Ex Ch). In *Vice v Lady Anson* (1827) 7 B & C 409 a person who erroneously believed herself to be a partner, and held herself out as such, but not to the plaintiff, was held not to be liable as a partner.

4 Partnership Act 1890 s 14(1).

5 *Martyn v Gray* (1863) 14 CBNS 824.

6 *Edmundson v Thompson and Blakey* (1861) 2 F & F 564. See *Elite Business Systems UK Ltd v Price* [2005] EWCA Civ 920, [2005] All ER (D) 342 (Jul) (defendant could not reasonably have foreseen that by opening a bank account to assist his son with his business, it would lead third parties to form the view that he was in partnership with his son).

7 *Burchell v Wilde* [1900] 1 Ch 551, CA; *Townsend v Jarman* [1900] 2 Ch 698 at 705; cf *Rosher v Young* (1901) 17 TLR 347. As to the firm name see further PARA 7.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iv) Holding out as Partners/27. Retired and deceased partners.

27. Retired and deceased partners.

The rule of estoppel by representation¹ applies to a former partner who has retired without giving proper notice of dissolution². The representation is a continuing one as regards persons who have dealt with the old firm unless and until such notice is given, but not as regards new customers or creditors who never knew that he was a partner³. Where, however, on the death of a partner the business is continued by the surviving partners under the old name, the rule does not apply so as to impose liability upon the personal representatives of the late partner for transactions of the surviving partners after his death⁴, even as regards old customers or creditors who have no notice of his death; and on this ground the court has refused to restrain the surviving partners from using his name⁵.

¹ See PARA 24.

² Cf the Partnership Act 1890 s 36; and PARA 195. See also *Brown v Leonard* (1816) 2 Chit 120. The liability would arise in the case of a person ceasing to be a partner if he 'had done business with the plaintiff before as a member of a firm or had so publicly appeared as to satisfy a jury that the plaintiff must have believed him to be such partner, or if he had suffered the plaintiff to continue in and act upon that belief by omitting to give notice that he had ceased to be a partner': *Carter v Whalley* (1830) 1 B & Ad 11 at 14 per Parke J. See also **ESTOPPEL** vol 16(2) (Reissue) PARA 1052 et seq.

³ *Waugh v Carver* (1793) 2 Hy Bl 235; *Newsome v Coles* (1811) 2 Camp 617, followed by Kay LJ in *Re Fraser, ex p Central Bank of London* [1892] 2 QB 633, CA; *Ex p Watson* (1815) 19 Ves 459 at 461; *Williams v Keats* (1817) 2 Stark 290; *Scarf v Jardine* (1882) 7 App Cas 345 at 349, 356, HL.

⁴ Partnership Act 1890 s 14(2); *Devaynes v Noble, Houlton's Case* (1816) 1 Mer 529 at 616; *Vulliamy v Noble* (1817) 3 Mer 593 at 614.

⁵ *Webster v Webster* (1791) 3 Swan 490n.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(2) THE QUESTION WHETHER A PARTNERSHIP EXISTS/(iv) Holding out as Partners/28. Enforcement of liability of persons held out.

28. Enforcement of liability of persons held out.

Where judgment has been obtained against a firm, execution may issue, with the permission of the court, against a person whose liability arose from holding out¹.

¹ See *Davis v Hyman & Co* [1903] 1 KB 854, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(i) Legality of Partnership/29. Illegality.

(3) FORMATION AND DURATION

(i) Legality of Partnership

29. Illegality.

A partnership may be illegal under statute or at common law. A partnership in the profits of a crime¹ or formed for making profits out of a business which is contrary to public policy or which cannot be carried on except illegally² is itself illegal³. It may be illegal if one of its partners is an unlicensed or unqualified person⁴. If a partnership has as its object or effect the prevention, restriction or distortion of competition, it will not per se be illegal, although it may be rendered null and void⁵ or result in the partnership being referred to the Competition Commission⁶. Although it may adopt any style or title and may describe itself as a company, and may transfer its shares by delivery of certificates, it must not assume to be nor usurp the rights or powers of a corporation⁷.

It is no longer illegal for a solicitor to take into partnership an unadmitted person⁸; nor is it illegal for a solicitor who holds public office to agree that his emoluments are to form part of the profits of his firm⁹; nor for a solicitor to agree to pay part of the profits of his business to an unqualified person¹⁰; nor for a retired solicitor to permit the use of his name by his former partners¹¹.

The partnership is dissolved when it becomes an illegal partnership¹². The knowledge of any partners of the event making it illegal is irrelevant¹³.

1 *Everet v Williams* (1725) 2 Pothier on Obligations by Evans 3n, cited in Lindley on Partnership (18th Edn) para 8-07.

2 See **CONTRACT** vol 9(1) (Reissue) PARA 836 et seq.

3 *Foster v Driscoll*, *Lindsay v Atfield*, *Lindsay v Driscoll* [1929] 1 KB 470 at 500, 501, CA (agreement held to be void on the ground that it was a breach of international comity). This decision was approved in *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301, [1957] 3 All ER 286, HL; but see *Re Grazebrook, ex p Chavasse* (1865) 4 De GJ & Sm 655 (blockade running). See also *Biggs v Lawrence* (1789) 3 Term Rep 454; *Clugas v Penaluna* (1791) 4 Term Rep 466 (sale of smuggled goods). A partnership formed for the carrying on of a bookmaking or betting business is illegal if it is intended or contemplated that such a partnership business should be carried on in a manner prohibited by statute: *Thwaites v Coulthwaite* [1896] 1 Ch 496 at 499 per Chitty J; *Jeffrey v Bamford* [1921] 2 KB 351 at 355, 350 per McCardie J (disapproving of dictum of Fletcher Moulton LJ in *Hyams v Stuart King* [1908] 2 KB 696 at 718, CA, and opinion of Darling J in *O'Connor and Ould v Ralston* [1920] 3 KB 451); and see also **LICENSING AND GAMBLING**. As to the effect of a potentially illegal contract upon an arbitration clause contained in the contract see *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, [1993] 3 All ER 897, CA.

4 The possible statutory restrictions are numerous. See eg:

3 (1) The Gambling Act 2005 s 33 (operating licence required for providing facilities for gambling: see **LICENSING AND GAMBLING** vol 68 (2008) PARA 615). Provided that a partner in a bookmaking partnership who does not have a bookmaker's licence does not himself secure or negotiate bets, the partnership is not illegal: see *Dungate v Lee* [1969] 1 Ch 545, [1967] 1 All ER 241.

4 (2) The Consumer Credit Act 1974 s 22(4) (prohibition on carrying on a consumer credit business without a licence issued by the Director General of Fair Trading: see *Re Taylor (London) Ltd*, *Miller v Taylor (London) Ltd* (1916) 86 LJ Ch 49; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 121).

- 5 (3) The Solicitors Act 1974 ss 1, 20 (unqualified person not to act as solicitor: see **LEGAL PROFESSIONS** vol 65 (2008) PARAS 589, 635).
 - 6 (4) The Estate Agents Act 1979 s 1 (restrictions on the carrying on of estate agency work: see **AGENCY** vol 1 (2008) PARA 240 et seq).
 - 7 (5) The Financial Services and Markets Act 2000 s 19 (prohibition on regulated activities except by authorised or exempt persons: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 80).
 - 8 (6) The Medical Act 1983 s 46 (prohibition on any person not fully registered under the Act from suing for any fee for any medical services rendered: see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARAS 100, 222).
 - 9 (7) The Dentists Act 1984 s 38 (prohibition on any persons other than registered dentists and registered dental care professionals from carrying on the practice of dentistry: see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 404).
 - 10 (8) The Copyright, Designs and Patents Act 1988 s 276 (prohibition on carrying on business under any name or description which contains the words 'patent agent' or 'patent attorney' unless all the partners are registered patent agents or the partnership satisfies the prescribed conditions: see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 615).
- 5 See Case IV/30.261 *Re Application of Ideal-Standard GmbH* [1988] FSR 574, EC Commission; and **COMPETITION** vol 18 (2009) PARA 65 et seq.
- 6 See **COMPETITION** vol 18 (2009) PARA 9 et seq.
- 7 *Re Mexican and South American Co, Grisewood and Smith's Case, De Pass's Case* (1859) 4 De G & J 544; *Re Mexican and South American Co, Aston's Case* (1859) 4 De G & J 320; *Maugham v Sharpe* (1864) 17 CBNS 443. Cf *Re General Co for Promotion of Land Credit* (1870) 5 Ch App 363; affd sub nom *Princess of Reuss v Bos* (1871) LR 5 HL 176.
- 8 See the Courts and Legal Services Act 1990 s 66(1) (repealing the Solicitors Act 1974 s 39); and **LEGAL PROFESSIONS**. See also *Williams v Jones* (1826) 5 B & C 108 (where oral evidence that the written agreement was not intended to take effect until such person was admitted was rejected). See also *Hudgell Yeates & Co v Watson* [1978] QB 451, [1978] 2 All ER 363, CA, where a solicitor allowed his practising certificate to lapse and it was held (following *Martin v Sherry* [1905] 2 IR 62, Ir CA) that the Partnership Act 1890 s 34 and the Solicitors Act 1957 s 18 (repealed: see now the Solicitors Act 1974 s 20), caused dissolution of his partnership, immediately, but that his co-partners instantly comprised among themselves a new partnership by operation of law. See also *Hill v Clifford* [1907] 2 Ch 236, CA (affd [1908] AC 12, HL (dentists struck off register)); *R v Kupfer* [1915] 2 KB 321, CCA.
- 9 *Clarke v Richards* (1835) 1 Y & C Ex 351; *Sterry v Clifton* (1850) 9 CB 110.
- 10 *Bunn v Guy* (1803) 4 East 190; *Candler v Candler* (1821) Jac 225 at 231.
- 11 *Aubin v Holt* (1855) 2 K & J 66.
- 12 As to dissolution see PARA 174 et seq.
- 13 *Hudgell Yeates & Co v Watson* [1978] QB 451, [1978] 2 All ER 363, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(i) Legality of Partnership/30. General effect of illegality.

30. General effect of illegality.

An agreement for an illegal partnership will not be specifically enforced, even though partly performed¹, nor can damages be recovered for breach of it²; and, if the whole purpose of the partnership is illegal, the court will not recognise it, or enforce any rights which the supposed partners would otherwise have³, especially where the parties have agreed to enter, as partners, into a transaction which they know to be illegal⁴. Therefore, an action will not lie for an account of profits of illegal underwriting⁵, even though the defendant does not plead the illegality, if it is brought to the notice of the court⁶; and, if the claimant's case discloses the illegality of the transaction, the court will not help him⁷. Where partners are engaged in illegal contracts and one of them pays the whole of the partnership debt in respect of the illegal transaction, he cannot enforce contribution against his partners⁸. It is no part of the duty of the court to aid either in carrying out an illegal contract or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract; and no claim can be maintained either for the one purpose or for the other⁹; but, if a partnership is not illegal in itself, the fact that the partners have evaded a statute is not a bar to a claim by one of them against the others for an account¹⁰.

1 *Ewing v Osbaldiston* (1837) 2 My & Cr 53. As to illegal contracts generally see **CONTRACT** vol 9(1) (Reissue) PARA 836 et seq. As to specific performance generally see **SPECIFIC PERFORMANCE**.

2 *Duvergier v Fellows* (1828) 5 Bing 248; affd (1832) 1 Cl & Fin 39, HL.

3 *Higginson v Simpson* (1877) 2 CPD 76; but see *Howard v Shirlstar Container Transport Ltd* [1990] 3 All ER 366, [1990] 1 WLR 1292, CA (non-partnership case), where the plaintiff was entitled to enforce a contract and thus benefit from his own fraud, notwithstanding that the purpose of the contract was to perform an illegal act, since (in the exceptional circumstances) to do so was not an affront to the public conscience. See also *Rowan v Dann* (1991) 64 P & CR 202, CA (where the plaintiff who had been negotiating with the defendant in relation to a proposed joint business venture agreement for an illegal purpose was entitled, upon failure of the venture so that the illegal purpose common to both parties had not yet been effected, to resign therefrom and be restored to his original position); and see PARA 29 note 3.

4 *Holman v Johnson* (1775) 1 Cowp 341; *Lees v Smith* (1797) 7 Term Rep 338; *Cousins v Smith* (1807) 13 Ves 542; *De Begnis v Armistead* (1833) 10 Bing 107; *Saffery v Mayer* [1901] 1 KB 11, CA.

5 *Booth v Hodgson* (1795) 6 Term Rep 405; *Aubert v Maze* (1801) 2 Bos & P 371; *Knowles v Haughton* (1805) 11 Ves 168; *Re Scott, ex p Bell* (1813) 1 M & S 751. Partnerships for underwriting were formerly illegal (6 Geo 1 c 18 (Royal Exchange and London Assurance Corporation) (1719)), but this statute was repealed on this point by 5 Geo 4 c 114 (Marine Assurance) (1824) (repealed).

6 *Scott v Brown, Doering, McNab & Co, Slaughter and May v Brown, Doering, McNab & Co* [1892] 2 QB 724, CA; *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, HL (where a contract is on the face of it illegal, the court will decline to enforce it, whether illegality is pleaded or not; but, where the question of illegality depends upon the surrounding circumstances, then, as a general rule, the court will not entertain the question unless it is raised by the statement of case).

7 *Gedge v Royal Exchange Assurance Corp*n [1900] 2 QB 214; cf *Thomson v Thomson* (1802) 7 Ves 470; and see generally **CONTRACT** vol 9(1) (Reissue) PARA 836 et seq.

8 *Cannan v Bryce* (1819) 3 B & Ald 179, overruling *Faikney v Reynous* (1767) 4 Burr 2069, and *Petrie v Hannay* (1789) 3 Term Rep 418.

9 *Sykes v Beadon* (1879) 11 ChD 170 at 193, 196 per Jessel MR; cf *Foster v Driscoll*, *Lindsay v Attfield*, *Lindsay v Driscoll* [1929] 1 KB 470, CA.

10 *Sharp v Taylor* (1849) 2 Ph 801; cf *Tenant v Elliott* (1797) 1 Bos & P 3; *Farmer v Russell* (1798) 1 Bos & P 296; *Thomson v Thomson* (1802) 7 Ves 470; but see *Re South Wales Atlantic Steam Ship Co* (1876) 2 ChD 763, CA. See also PARAS 29, 153.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(i) Legality of Partnership/31. Enforcement of rights of innocent parties.

31. Enforcement of rights of innocent parties.

A person who has obtained money from his partners for an illegal transaction which he has represented as being legal will not be allowed to keep the money¹. The members of an illegal association do not lose their legal rights as owners of property². Furthermore, before the illegal purpose is carried out, the court can assist the persons who have contributed money for such a purpose to recover it from the persons who have collected it, and may order those who collected it to render an account³.

1 *Sykes v Beadon* (1879) 11 ChD 170 at 193, 196 per Jessel MR; cf *Foster v Driscoll*, *Lindsay v Attfield*, *Lindsay v Driscoll* [1929] 1 KB 470, CA; and see *Hale v Hale* (1841) 4 Beav 369.

2 *R v Frankland* (1863) Le & Ca 276, CCR.

3 *Greenberg v Cooperstein* [1926] Ch 657; and see *Rowan v Dann* (1991) 64 P & CR 202, CA (joint venturers); and PARAS 29 note 3, 30 note 3.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(i) Legality of Partnership/32. Partial illegality.

32. Partial illegality.

If the fundamental objects of a partnership are legal, the fact that the partnership agreement or rules contain illegal provisions does not invalidate the whole¹; and, if the objects of the partnership can, and are intended to, be carried out without any breach of the common law or statute, the fact that one partner has been guilty of illegal acts² in the conduct of the business does not make the partnership illegal or prevent an innocent partner from enforcing the partnership obligations³.

1 *Collins v Locke* (1879) 4 App Cas 674, PC; *Swaine v Wilson* (1889) 24 QBD 252, CA. See also *R v Whitmarsh, Re National Land Co* (1850) 15 QB 600; *Re One And All Sickness and Accident Assurance Association* (1909) 25 TLR 674 (valid trust not illegal association); cf *Greenberg v Cooperstein* [1926] Ch 657 (gain by members, if not by association, enough to make it illegal).

2 Or has failed to comply with the relevant licensing regulations: see *Dodge v Eisenman* (1985) 23 DLR (4th) 711, 68 BCLR 327, BC CA (compromise agreement in a non-partnership business venture). The position may, however, be different with respect to solicitors, barristers and members of other recognised professional bodies: see *Hudgell Yeates & Co v Watson* [1978] QB 451, [1978] 2 All ER 363, CA. As to illegal partnerships generally see PARA 29 et seq.

3 *Harvey v Hart* [1894] WN 72 (following *De Mattos v Benjamin* (1894) 63 LJQB 248, and distinguishing *Higginson v Simpson* (1877) 2 CPD 76); *Thwaites v Coulthwaite* [1896] 1 Ch 496; *Dungate v Lee* [1969] 1 Ch 545 at 550, [1967] 1 All ER 241 at 250. Where the case depends upon the construction of the illegal contract and the defendant's construction is preferred by the court, the defendant may be able to rely on that construction, and he cannot be held to be relying on his own wrong thereby: *Thornton v Abbey National plc* (1993) Times, 4 March, CA (non-partnership case); and see PARAS 29-30.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(ii) Personal Capacity/33. Minors.

(ii) Personal Capacity

33. Minors.

There is nothing to prevent a person who has not attained the age of 18¹ from becoming a partner; and, until his contract of partnership is disaffirmed, he is a member of the firm². He will not, however, during his minority incur liability to his co-partners or to third parties for the debts of the firm or for the acts of his co-partners³; but, if on behalf of the partnership he enters into contracts with third persons, those contracts bind his adult partners⁴. When the minor reaches the age of 18, or in some cases a younger age, he may choose to repudiate the partnership agreement, in which event his adult co-partners may either seek a restitution order under the Minors' Contracts Act 1987 or insist that the partnership assets are to be applied in payment of the partnership liabilities before he receives anything⁵. A partner who is a minor who commits a wrong, as, for example, by falsely representing his firm to be connected with a stranger's business, may be restrained by injunction and ordered to pay costs⁶; likewise, a minor is liable in equity for fraudulent misrepresentation⁷, as by holding himself out as a person of full age⁸.

In a claim against partners, a partner who is a minor ought not to be joined as a defendant⁹; and, if the claim is brought against them in the name of the firm and judgment is given against them, it should be entered against the firm exclusive of the minor¹⁰.

On attaining the age of 18, the minor may repudiate the partnership contract¹¹, but on such repudiation he cannot recover a premium paid by him under a partnership contract on which he has acted¹², if he has derived any real benefit from the contract. It is otherwise if there has been an entire failure of consideration¹³. If he adopts the contract and continues the partnership after attaining his majority, he is liable for the firm's debts contracted during his minority¹⁴, and he cannot claim as against his co-partners to share the profits without also sharing the losses of the concern¹⁵.

1 A person attains full age on attaining the age of 18: see the Family Law Reform Act 1969 s 1(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

2 *Lovell and Christmas v Beauchamp* [1894] AC 607 at 611, HL, per Lord Herschell LC.

3 *Harris v Beauchamp Bros* [1893] 2 QB 534, CA; *Lovell and Christmas v Beauchamp* [1894] AC 607 at 611, HL, per Lord Herschell LC.

4 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 16.

5 *Burgess v Merrill* (1812) 4 Taunt 468. See also **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 4, 12. As to the effect of the minority of a partner on proceedings for dissolution or winding up see PARA 190.

6 *Chubb v Griffiths* (1865) 35 Beav 127; *Lemprière v Lange* (1879) 12 ChD 675; *Woolf v Woolf* [1899] 1 Ch 343; and see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 26.

7 *Re Jones, ex p Jones* (1881) 18 ChD 109 at 120, CA; and see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 20.

8 *Re Lees and Smith, ex p Lees, ex p Heatherly* (1836) 1 Deac 705; cf *Ex p Watson* (1809) 16 Ves 264; *Re Bates, ex p Bates* (1841) 2 Mont D & De G 337. No representation that the minor who so trades is of full age arises, however, out of the mere fact of his carrying on the trade: *Re King, ex p Unity Joint Stock Mutual Banking Association* (1858) 3 De G & J 63.

9 *Chandler v Parkes* (1800) 3 Esp 76; *Jaffray v Frebain* (1803) 5 Esp 47; *Gibbs v Merrill* (1810) 3 Taunt 307; *Burgess v Merrill* (1812) 4 Taunt 468.

10 *Lovell and Christmas v Beauchamp* [1894] AC 607 at 613, HL.

11 *Goode v Harrison* (1821) 5 B & Ald 147; see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 25.

12 *Holmes v Blogg* (1817) 8 Taunt 35; *Re Burrows, ex p Taylor* (1856) 8 De GM & G 254; *Wilson v Kears* (1800) Peake Add Cas 196.

13 *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch 589; cf *Corpe v Overton* (1833) 10 Bing 252.

14 *Goode v Harrison* (1821) 5 B & Ald 147. 'A trading of a sort is deposed to, but that was during infancy; if, however, that trading was carried on after the trader became adult, though in a much less degree, the quantity of trading would not make him the less a trader': *Ex p Moule* (1808) 14 Ves 602 at 603 per Lord Eldon LC.

15 *North Western Rly Co v M'Michael, Birkenhead, Lancashire and Cheshire Junction Rly Co v Pilcher* (1850) 5 Exch 114 at 123, 126; *Cork and Bandon Rly Co v Cazenove* (1847) 10 QB 935; *Constantinople and Alexandria Hotel Co, Ebbett's Case* (1870) 5 Ch App 302.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(ii) Personal Capacity/34. Aliens.

34. Aliens.

An alien¹ who is not an enemy may enter into and carry out a contract of partnership in England and Wales with another such alien or with a British national². An alien enemy³ is incapable of entering into a contract of partnership⁴. If an alien is a partner when he becomes an alien enemy, the partnership is forthwith dissolved⁵. He does not, however, forfeit his rights after dissolution either to his partner or partners or to the Crown, but his ability to enforce these rights is suspended as long as he remains an alien enemy⁶. The partnership which has been dissolved is not reconstituted when he ceases to be an enemy⁷. The incapacity of an alien enemy can be wholly or partially removed by a licence from the Crown⁸.

1 As to who are aliens see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

2 *Wells v Williams* (1697) 1 Salk 46; *Porter v Freudenberg* [1915] 1 KB 857 at 869, CA; *Johnstone v Pedlar* [1921] 2 AC 262 at 273, 276, 296, HL.

3 As to alien enemies see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 573 et seq.

4 'There can be no partnership between alien enemies and a subject of this country when war has once been declared. Commercial intercourse is prohibited, and immediately that prohibition comes into force it is impossible for the relationship of partners to subsist, at any rate during the war': *R v Kupfer* [1915] 2 KB 321 at 338, CCA, per Lord Reading CJ. See also *Hugh Stevenson & Sons Ltd v AG für Cartonnagen-Industrie* [1918] AC 239, HL; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 573 et seq. The view expressed by Shearman J in *Feldt v Chamberlain* (1914) 58 Sol Jo 788 that 'the partnership is only dissolved as regards the alien enemy partner and that English partners are not affected', is of doubtful authority. As to the appointment of a receiver and manager where some of the partners have become alien enemies see PARA 163.

5 See note 4.

6 *Hugh Stevenson & Sons Ltd v AG für Cartonnagen-Industrie* [1918] AC 239 at 245, 247, HL.

7 Cf *Porter v Freudenberg* [1915] 1 KB 857 at 873, 874, CA.

8 *Princess Thurn and Taxis v Moffitt* [1915] 1 Ch 58; and see *Porter v Freudenberg* [1915] 1 KB 857 at 874, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(ii) Personal Capacity/35. No incapacity on grounds of gender, race etc.

35. No incapacity on grounds of gender, race etc.

It is unlawful for a firm, in relation to a position as partner in the firm, to discriminate against any person on the grounds of gender, race, ethnic or national origin, disability, religion or belief, age or sexual orientation¹.

¹ See the Sex Discrimination Act 1975 s 11; the Race Relations Act 1976 s 10; the Disability Discrimination Act 1995 ss 6A-6C; the Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, reg 14; the Employment Equality (Age) Regulations 2006, SI 2006/1031, reg 17; the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, reg 14; and PARA 113.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(ii) Personal Capacity/36. Persons suffering from mental disorder.

36. Persons suffering from mental disorder.

A partnership agreement entered into by a person apparently sane, where that person is not known by the other parties to be otherwise¹ and where there are no proceedings under the Mental Capacity Act 2005² in progress, is binding on him even if in fact he was suffering from a mental disorder at the time³. If, however, the other parties knew him to be suffering from a mental disorder, the agreement will be set aside⁴.

1 See *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC (contract case); and note 3.

2 See under the Mental Capacity Act 2005 s 16 under which the Court of Protection may, by making an order, make decisions or appoint a deputy to make decisions on a person's behalf in relation to matters concerning his personal welfare, or property and affairs where he lacks capacity to do so himself: see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 757. See also *Re Marshall, Marshall v Whateley* [1920] 1 Ch 284.

3 *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC (the validity of the contract was to be judged by the same standards as a contract made by a person of sound mind; the fact that there was inequality of bargaining power did not give the person of unsound mind the right to end the contract unless such unfairness amounted to equitable fraud which would have permitted him to avoid the contract if he had been sane).

4 *Molton v Camroux* (1848) 2 Exch 487 (affd (1849) 4 Exch 17); *Imperial Loan Co v Stone* [1892] 1 QB 599, CA; and see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 602. As to dissolution on the grounds of mental disorder see PARA 184.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(ii) Personal Capacity/37. Companies and other corporations.

37. Companies and other corporations.

A corporation can enter into partnership with an individual person¹, or with another corporation whatever may be its nationality and wherever it may be situate². A local authority may also be a partner³.

Such partnerships may, however, be illegal if they fail to fulfil statutory requirements. For example, a partnership of professional persons, all of whom are required to be qualified, might be illegal if it included a corporation⁴.

Many of the provisions of the Partnership Act 1890 are difficult to apply to corporate bodies⁵, especially those dealing with death and bankruptcy⁶.

Partnerships with a corporate member are specifically recognised by income tax legislation⁷.

1 *Newstead (Inspector of Taxes) v Frost* [1980] 1 All ER 363, [1980] 1 WLR 135, HL. Note that a company's capacity is no longer limited by its memorandum and the power of the board of directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution: see the Companies Act 1985 ss 35, 35A (prospectively repealed); and **COMPANIES** vol 14 (2009) PARAS 263, 265. As from a day to be appointed, ss 35, 35A are repealed and will be replaced by the Companies Act 2006 ss 39, 40 (not yet in force). At the date at which this volume states the law no such day had been appointed. As to corporate partnerships generally see PARA 1 note 4.

2 See *Hugh Stevenson & Sons Ltd v AG für Cartonnagen-Industrie* [1918] AC 239, HL (partnership between English and German companies); *Hogar Estates Ltd in Trust v Shebron Holdings Ltd* (1979) 25 OR (2d) 543, 101 DLR (3d) 509 (Ont). As to enemy aliens see PARA 34.

3 *Jones v Secretary of State for Wales* (1974) 28 P & CR 280, CA.

4 See PARA 29.

5 See especially the Partnership Act 1890 s 29(2) (see PARA 107), s 30 (see PARA 108), s 33 (see PARAS 176-177), s 36(3) (see PARA 78) and s 39 (see PARA 206).

6 Provisions as to death and bankruptcy can hardly apply to corporations notwithstanding the definition of 'person' in the Interpretation Act 1978 s 5, Sch 1, as including a body of persons corporate or unincorporate.

7 See the Income and Corporation Taxes Act 1988 ss 114-116; and **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1430-1433.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(iii) Evidence of Formation; Partnership Agreements/38. Evidence in writing.

(iii) Evidence of Formation; Partnership Agreements

38. Evidence in writing.

The formation and terms of a partnership¹ may be evidenced by a partnership deed², by an agreement signed by the partners, by an unsigned document drafted by one partner and adopted and acted on by the others³, and even by an informal document initialled by the partners and intended only to form instructions for a formal document⁴.

A document signed by one person only, which would otherwise have been invalid for want of mutuality, may become evidence of the terms of a partnership if acted upon⁵.

1 As to the contractual basis on which the relationship is founded see PARA 1 note 1.

2 For the usual provisions in a partnership agreement see PARA 41.

3 *Worts v Pern* (1707) 3 Bro Parl Cas 548, HL; *Baxter v West* (1860) 1 Drew & Sm 173.

4 *England v Curling* (1844) 8 Beav 129. Each member of a firm has a property in his own copy of a partnership deed executed in multiple: *Forbes v Samuel* [1913] 3 KB 706 at 722-724.

5 *Heyhoe v Burge* (1850) 9 CB 431.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(iii) Evidence of Formation; Partnership Agreements/39. Oral evidence.

39. Oral evidence.

The existence of a partnership may be established by oral evidence even when a written partnership agreement is in existence¹. Admissions made by a person in a former claim², or in an income tax return³, that he is a partner, or a verdict on an issue directed to try whether a person is a partner⁴, or even the advertisement of a dissolution⁵ may be used as evidence to establish a partnership. A partnership agreement may probably be proved by oral evidence, even if the partnership is to deal with land⁶, but such an agreement, for example an alleged agreement of partnership in the profits of land alone, when the parties have not acted as partners so that the existence of a partnership is in doubt, is probably subject to the general statutory provisions relating to contracts for the sale or other disposition of an interest in land⁷, namely that, unless the agreement in question is in writing, incorporating all the expressly agreed terms of the contract in one document or, where contracts are exchanged, in each and signed by or on behalf of each party to the contract, the agreement will be void⁸.

As to whether there is or is not a partnership, the court will look at the statements of the parties as one factor in order to consider the substance of the agreement⁹, but the use by the parties of the word 'partner' is not conclusive evidence of partnership¹⁰.

1 *Alderson v Clay* (1816) 1 Stark 405. As to evidence in writing see PARA 38.

2 *Studdy v Sanders* (1823) 2 Dow & Ry KB 347.

3 *Fogg v Gaulter and Blane* (1960) 110 L Jo 718.

4 *Whately v Menheim* (1797) 2 Esp 607.

5 *Ex p Matthews* (1814) 3 Ves & B 125.

6 As to the position under the old law viz the Statute of Frauds (1677) s 4 (the predecessor to the Law of Property Act 1925 s 40) where proof by oral evidence was permissible see *Gray v Smith* (1889) 43 ChD 208 at 211, CA, per Kekewich J; *Forster v Hale* (1800) 5 Ves 308; *Dale v Hamilton* (1846) 5 Hare 369 (on appeal (1847) 2 Ph 266) (cf *Essex v Essex* (1855) 20 Beav 442); *Re De Nicols, De Nicols v Curlier* [1900] 2 Ch 410. The Law of Property Act 1925 s 40 (contracts for the sale or other disposition of land to be evidenced in writing; doctrine of part performance) was repealed with effect from 27 September 1989: see the Law of Property (Miscellaneous Provisions) Act 1989 ss 2(8), 4, 5(3), (4), Sch 2. An agreement for the sale or other disposition of land made on or after 27 September 1989 must comply with the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (see **SALE OF LAND** vol 42 (Reissue) PARA 29); sed quaere whether the same principles relating to partnership agreements involving land will still apply under the Law of Property (Miscellaneous Provisions) Act 1989.

7 See *Caddick v Skidmore* (1857) 3 Jur NS 1185; *Isaacs v Evans* [1899] WN 261; *Toogood v Farrell* [1988] 2 EGLR 233, CA (agreement by a retiring partner to grant the continuing partners a sublease of the premises which the firm used for its business) (decided under the Law of Property Act 1925 s 40 (repealed)). It is uncertain whether the same principles will be applied under the Law of Property (Miscellaneous Provisions) Act 1989 s 2: see note 6.

8 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600 (option to purchase).

9 See *Greville v Venables* [2007] EWCA Civ 878, [2008] All ER (D) 132 (Jan) (no express agreement to form partnership).

10 *Thames Cruises Ltd v George Wheeler Launches Ltd* [2003] EWHC 3093 (Ch), [2003] All ER (D) 285, (Dec) (lay people use the word 'partner' in a colloquial sense meaning people who go into business in some way).

without being true partners in law). See also *Weiner v Harris* [1910] 1 KB 285 at 290, CA, per Cozens-Hardy MR (not a partnership case): 'Two parties enter into a transaction and say 'It is hereby declared there is no partnership between us'. The court pays no regard to that. The court looks at the transaction and says 'Is this, in point of law, really a partnership?' It is not in the least conclusive that the parties have used a term or language intended to indicate the transaction is not that which in law it is'.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(iii) Evidence of Formation; Partnership Agreements/40. Mode of dealing.

40. Mode of dealing.

The mode of dealing adopted by partners is evidence of the formation and original terms of a partnership if those terms are not set out in any document. Partners are bound by the duties and obligations which are implied in every partnership contract if and so far as the express contract does not deal with them¹ and subject to the provisions of any statute².

The mutual rights and duties of partners, whether ascertained by agreement or defined by the Partnership Act 1890, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing³. This is so even if the agreement is evidenced by writing⁴. An alteration in a partnership deed appearing on the face of the deed (where it is not made or presumed to have been made before execution⁵) cannot be taken into consideration⁶, and, if an oral agreement is alleged to vary the partnership agreement so as to affect the partners' financial interests, the intention to produce this effect must clearly appear by the evidence⁷.

Under the court's general jurisdiction over the property of minors, the court may vary a partnership agreement which is unduly onerous to a surviving partner where the new arrangement will be more beneficial for minors interested in the estate of a deceased partner⁸.

1 *Smith v Jeyes* (1841) 4 Beav 503.

2 See eg the Scrap Metal Dealers Act 1964 s 7; and **TRADE AND INDUSTRY** vol 97 (2010) PARAS 864-865.

3 Partnership Act 1890 s 19. See also *Const v Harris* (1824) Turn & R 496; *England v Curling* (1844) 8 Beav 129; *Vale of Neath and South Wales Brewery Co, Keene's Executors' Case* (1853) 3 De GM & G 272; *Austen v Boys* (1858) 2 De G & J 626 (following *Geddes v Wallace* (1820) 2 Bli 270, HL); *Coventry v Barclay* (1863) 33 Beav 1 (on appeal (1864) 3 De GJ & Sm 320); *Pilling v Pilling* (1865) 3 De GJ & Sm 162 (where the books were kept, and certain expenses were paid, otherwise than in accordance with the partnership agreement); *Peat v Smith* (1889) 5 TLR 306. Where a firm governed by a deed was joined by a new partner who never executed the deed because he did not agree all its terms, it was held that a new partnership at will had come into effect between all the parties, irrespective of the terms of the deed: *Firth v Amslake* (1964) 108 Sol Jo 198; but see *Austen v Boys* (1857) 24 Beav 598 (affd (1858) 2 De G & J 626); *Zamikoff v Lundy* [1970] 2 OR 8, 9 DLR (3d) 637 (affd sub nom *Whisper Holdings Ltd v Zamikoff* [1971] SCR 933, 19 DLR (3d) 114); and PARAS 44, 205. See also *Hudgell Yeates & Co v Watson* [1978] QB 451, [1978] 2 All ER 363, CA.

4 See PARA 38.

5 As to alterations in deeds and their effect see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 84.

6 *Re Duncan and Pryce* [1913] WN 117, DC.

7 *Lawes v Lawes* (1878) 9 ChD 98.

8 *Martindale v Martindale* (1855) 1 Jur NS 932. As to the approval of compromises in claims to which a minor is a party see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1423.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(iii) Evidence of Formation; Partnership Agreements/41. Partnership agreements.

41. Partnership agreements.

The relations between partners are usually regulated by partnership agreements. Many provisions of the Partnership Act 1890 apply only in the absence of any agreement to the contrary, and so the agreement may supersede numerous provisions of the statute.

Partnership agreements are governed by the law of contract¹ and will be construed according to normal canons of construction², so that a court will construe a partnership agreement in the light of partners' objectives³, and terms may be implied by the court to give the agreement business efficacy⁴.

Partnership agreements are usually in writing, but, even so, may be varied orally⁵. The principal matters⁶ which are commonly governed⁷ by partnership agreements are: the firm name⁸; the duration of the partnership⁹; the capital needed, and its provision in cash or other assets; the firm's banking account and the drawing of cheques; and terms to be observed during the continuance of the partnership, for example the banking of receipts, the payment of outgoings, the sharing of profits and losses, weekly or monthly drawings on account, loans by a partner to the firm, holidays and illness, duties and attention to business, management, misconduct and expulsion¹⁰, and arbitration¹¹. Finally, provision may be made for the dissolution of the partnership by effluxion of time or the death, bankruptcy or retirement of a partner¹²; or for ex-partners to be restrained from competing with the firm¹³. The continuing partners may be required or given an option to purchase the share of a deceased or retiring partner¹⁴, in which case the partnership agreement may provide for an indemnity against partnership liabilities including income tax¹⁵.

1 As to the contractual basis of the relationship of partnership see PARA 1 note 1.

2 See *Re Marr* [1990] Ch 773 at 777, [1990] 2 All ER 880, CA, where Nicholls LJ emphasised that courts now generally prefer a modern, purposive approach to questions of construction, with regard to statutes, as opposed to the older mechanical rules of construction.

3 *Hitchman v Crouch Butler Savage Associates* (1983) 127 Sol Jo 441, CA (clause in the partnership agreement requiring a particular partner to sign all expulsion notices held not to apply where it was that partner who was being expelled by his co-partners). If a partner expels his co-partner, giving a wrong or inadequate reason for such expulsion, the former may yet justify the expulsion if there were at the time facts in existence which would have provided a good reason, even if he did not know of them at the time: *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339 at 352, 364, CA.

4 *Miles v Clarke* [1953] 1 All ER 779, [1953] 1 WLR 537, where Harman J applied the 'implied term' test in order to ascertain which assets were partnership assets. In that case the two-man partnership of photographers had been in existence for only a short time, one of the partners having previously been the sole owner of the majority of the tangible assets, the other of the business's goodwill.

5 See PARAS 39-40.

6 Partnership agreements contain other provisions: eg in a partnership between solicitors, provision may be made concerning partnership appointments, trainee solicitors and legacies from clients, and specially valued employees may need consideration. In a medical partnership, provision may be made for appointments, cars, instruments, drugs and visits. As to the inclusion of an express power to dissolve the firm on notice see PARA 191.

7 It is sometimes found convenient to set out in partnership agreements the substance of some of the provisions of the Partnership Act 1890 eg s 5 (see PARA 45), s 24 (see PARA 110 et seq), s 28 (see PARA 135), s 30 (see PARA 108) and s 31 (see PARA 126).

- 8 As to the firm name see PARA 7.
- 9 As to the duration of partnerships see PARA 43 et seq.
- 10 As to expulsion see PARA 179.
- 11 As to the effect of an arbitration clause on the right to claim dissolution by the court see PARA 183. As to arbitration generally see **ARBITRATION**.
- 12 As to dissolution see PARA 174 et seq; and as to the rectification of an agreement embodying the terms of a firm's dissolution see *Rehman v Ahmad* [1993] CLY 679, Ct of Sess.
- 13 See PARA 42; and **COMPETITION** vol 18 (2009) PARA 377 et seq.
- 14 As to such provisions see PARA 201.
- 15 As to a partner's implied right to an indemnity in such a case see PARA 200. As to a partner's liability to income tax see PARA 100; and **INCOME TAXATION**. As to the liability for inheritance tax on a partner's estate see PARA 102; and **INHERITANCE TAXATION**.

UPDATE

41 Partnership agreements

NOTE 12--See *Tann v Herrington* [2009] EWHC 445 (Ch), [2009] All ER (D) 135 (Mar) (two partner firm; fact that retirement caused dissolution did not prevent operation of retirement provisions in partnership agreement).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(iii) Evidence of Formation; Partnership Agreements/42. Covenants in restraint of trade.

42. Covenants in restraint of trade.

Partnership agreements often contain provisions prohibiting an outgoing partner from carrying on a similar trade or profession within specified limits of time and distance¹. Such provisions are not enforceable unless the restrictions are reasonable². In order to uphold a covenant in restraint of trade, the claimant must establish that: (1) he has a legitimate interest capable of being protected; (2) the restrictive covenants are no more than adequate to protect the interest (meaning not excessive as regards area, duration or prohibited activities); and (3) without the enforcement of such covenants, the interest or goodwill could be injured or damaged³.

It will usually be easier to prove that a covenant in restraint of trade is reasonable if it applies equally as between all members of the firm⁴, but the court is less willing to avoid such provisions made between partners than it is to avoid similar provisions in contracts of employment⁵.

Where some part of an otherwise void covenant in restraint of trade is reasonable, it may, where it satisfies the 'blue pencil' test, be severed by the court and thus remain enforceable⁶.

1 *Shackle v Baker* (1808) 14 Ves 468; *Morris v Colman* (1812) 18 Ves 437. See also *Cooper v Watlington* (1784) 2 Chit 451; *Cooper v Page* (1876) 34 LT 90 (where one partner agreed to advance money to a third person on terms that he should receive, by way of interest, a share of the profits of the business carried on by that person, and it was held that this was a breach of covenant 'not to engage directly or indirectly in any other business'); *Prescott v Dunwoody Sports Marketing* [2007] EWCA Civ 461, [2007] 1 WLR 2343. Such covenants will normally be strictly construed; but see *Clarke v Newland* [1991] 1 All ER 397, CA. Covenants in restraint of trade in the National Health Service are governed by normal principles, notwithstanding that the goodwill which the covenants are designed to protect is unsaleable (see the National Health Service Act 2006 s 259, Sch 21; and **HEALTH SERVICES**) and notwithstanding previous authority to the opposite effect (*Kerr v Morris* [1987] Ch 90, [1986] 3 All ER 217, overruling *Hensman v Traill* (1880) 124 Sol Jo 776; and see *Peyton v Mindham* [1971] 3 All ER 1215, [1972] 1 WLR 8, not following *Macfarlane v Kent* [1965] 2 All ER 376, [1965] 1 WLR 1019). An injunction may be granted to prevent breach: see PARA 172. The courts have, in the past, struck down restraints that were aimed at restricting a client's freedom to choose the legal adviser of his choice (see *Oswald Hickson Collier & Co v Carter-Ruck* [1984] AC 720n, [1984] 2 All ER 15, CA; cf *Edwards v Worboys* [1984] AC 724n, [1984] 2 WLR 850, CA) but have also upheld such covenants as well (see *Bridge v Deacons (a firm)* [1984] AC 705, [1984] 2 All ER 19, PC). Where, however, there is a general dissolution of the partnership (see PARA 174 et seq), the partners will not (unless the right to do so has been expressly provided for: see *Peyton v Mindham*) be able to enforce such covenants against their co-partners: *Brace v Calder* [1895] 2 QB 253; *Briggs v Oates* [1991] 1 All ER 407, [1990] ICR 473 (applying the principle to a salaried partner); and see PARA 172 (injunctions after dissolution) and PARAS 215-216 (injunctions protecting the value of a firm's goodwill whilst being wound up). As to whether the consideration received in return for the imposition upon it of a covenant in restraint of trade arises from the disposal of an asset for capital gains tax purposes and is therefore taxable see *Kirby (Inspector of Taxes) v Thorn EMI plc* [1988] 2 All ER 947, [1988] 1 WLR 445, CA (company case). As to covenants in restraint of trade generally see **COMPETITION** vol 18 (2009) PARA 377 et seq.

2 *Rayner v Pegler* (1964) 189 Estates Gazette 967; *Bridge v Deacons (a firm)* [1984] AC 705, [1984] 2 All ER 19, PC (where the fact that inadequate consideration was given for the retiring partner's share of goodwill did not of itself lead to the covenant in restraint of trade being held to be unreasonable); but, where the court is considering whether or not the covenant in restraint of trade is severable, the severability of the consideration given for the restraint will be scrutinised (*Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388). The true test of enforceability lies in whether or not the enforcing party is seeking merely to protect his legitimate interests (*Bridge v Deacons (a firm)* above); and the concept of proportionality as regards the interests to be protected of the covenantor and covenantee respectively has no place in deciding whether a particular covenant is valid or not (*Allied Dunbar (Frank Weisinger) Ltd v Weisinger* [1988] IRLR 60). What is 'reasonable' will be viewed in light of the factual matrix existing at the time the covenant was entered into and of the object which the covenant was intended to achieve: *Clarke v Newland* [1991] 1 All ER 397, CA (salaried partner's covenant in restraint of trade). It does not matter that, in any event, clients do not wish to continue

dealing with the party entitled to protection: *John Michael Design plc v Cooke* [1987] 2 All ER 332, CA (case involving an employee). Even where the court regards a particular covenant as probably void for being unreasonable, the court may enforce it in proceedings for an interim injunction: *Curson & Poole (a firm) v Rash* (1982) 263 Estates Gazette 518, CA (balance of convenience); and see PARA 172.

3 *Espley v Williams* [1997] 8 EG 137, CA (covenant preventing estate agent, for a period of two years, from acting as estate agent in residential property within two miles of former firm upheld).

4 *Bridge v Deacons (a firm)* [1984] AC 705, [1984] 2 All ER 19, PC; but see *Clarke v Newland* [1991] 1 All ER 397, CA.

5 *Whitehill v Bradford* [1952] Ch 236 at 245, 246, [1952] 1 All ER 115 at 17, CA, per Sir Raymond Evershed MR; but see *Geraghty v Minter* (1979) 26 ALR 141, Aust HC. For an employee's covenant in restraint of trade that was held to be too wide to be enforceable see *Marley Tile Co Ltd v Johnson* [1982] IRLR 75, CA.

6 *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388; *Business Seating (Renovations) Ltd v Broad* [1989] ICR 729 (both cases involving employees).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(iv) Duration of Partnership/43. Duration of partnership.

(iv) Duration of Partnership

43. Duration of partnership.

A partnership may be entered into for: (1) a fixed term; (2) a single adventure or undertaking; or (3) an undefined time¹.

Unless otherwise agreed, where the partnership is for a fixed term, it terminates on the expiration of that term². A partnership entered into for a single undertaking is dissolved by the expiry of that undertaking³. Where no fixed term has been agreed upon for the duration of the partnership, it is a partnership at will⁴ and any partner may determine it at any time on giving notice of his intention to do so to all the other partners⁵. Where a specified term, albeit one of indefinite duration, has been agreed upon, there is no power to dissolve by notice⁶.

Where there is no express agreement to continue a partnership for a definite period, there may be an implied agreement to do so⁷. The fact that the partners have bought a lease for a fixed term is not in itself sufficient evidence of such an implied agreement⁸, nor is the incurring of debts⁹. The burden of proving such an implied agreement is upon the person who alleges its existence¹⁰, and the provisions relied on must be clearly inconsistent with the general right to dissolve¹¹. There is no presumption that a sub-partnership is to be for the same term as the principal partnership¹².

1 See the Partnership Act 1890 s 32.

2 Partnership Act 1890 s 32(a). If a fixed term partnership is continued after the expiry of that term without express new agreement, a partnership at will arises: Partnership Act 1890 s 27(1); and see the text and notes 4-5; and PARA 44.

3 Partnership Act 1890 s 32(b). See *Reade v Bentley* (1858) 4 K & J 656; *McClellan v Kennard* (1874) 9 Ch App 336. The principle is similar to that where a company is incorporated for the purpose of undertaking a single venture: see *Re Abbey Leisure Ltd* [1990] BCC 60, CA. As to the relationship and duties which may exist between persons who are as yet merely negotiating to enter into partnership together see PARA 1 note 2.

4 *Moss v Elphick* [1910] 1 KB 846, CA; *Abbott v Abbott* [1936] 3 All ER 823; *Walters v Bingham, Bingham v Walters* [1988] 1 FTLR 260.

5 Partnership Act 1890 ss 26(1), 32(c). Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, is sufficient for this purpose: s 26(2); and see *Doe d Waithman v Miles* (1816) 4 Camp 373. The issue and service of a writ (*Unsworth v Jordan* [1896] WN 2, overruling *Shepherd v Allen* (1864) 33 Beav 577) and the service of a defence (*Syers v Syers* (1876) 1 App Cas 174, HL) have also been held to be a sufficient notice. As to the date from which dissolution will be ordered see *Lyon v Tweddell* (1881) 17 ChD 529, CA. 'There is no technicality, no magic as to the mode of expression': *Syers v Syers* (1876) 1 App Cas 174 at 183, HL, per Lord Cairns LC.

The Court of Protection has power to dissolve a partnership by service of a dissolution notice where a partner lacks capacity because he is unable to make a decision for himself because of an impairment of, or a disturbance in the functioning of, the mind or brain: see the Mental Capacity Act 2005 ss 2, 16, 18(1)(e); and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 607, 757, 759.

As to dissolution on notice see further PARA 174. As to the notice of dissolution see PARAS 194-196.

6 *Moss v Elphick* [1910] 1 KB 465 (affd [1910] 1 KB 846, CA); *Abbott v Abbott* [1936] 3 All ER 823; *Walters v Bingham, Bingham v Walters* [1988] 1 FTLR 260.

7 *Crawshay v Maule* (1818) 1 Swan 495.

8 *Syers v Syers* (1876) 1 App Cas 174, HL; *Featherstonhaugh v Fenwick* (1810) 17 Ves 298; *Crawshay v Maule* (1818) 1 Swan 495; *Jefferys v Smith* (1820) 1 Jac & W 298 at 301; *Alcock v Taylor* (1830) Tam 506; *Burdon v Barkus* (1862) 4 De GF & J 42. However, a lease by one partner to his firm expires at the end of the term fixed for the partnership, even if expressed to be for a longer period: see *Pocock v Carter* [1912] 1 Ch 663; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 239.

9 *King v Accumulative Life Fund and General Assurance Co* (1857) 3 CBNS 151.

10 *Burdon v Barkus* (1862) 4 De GF & J 42.

11 *Baxter v Plenderleath* (1824) 2 LJOS Ch 119.

12 *Frost v Moulton* (1856) 21 Beav 596. As to sub-partnerships see PARA 112.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/1. CREATION AND DURATION/(3) FORMATION AND DURATION/(iv) Duration of Partnership/44. Continuation of business.

44. Continuation of business.

Where there is a continuation of the business by the partners, or such of them as habitually acted in it during the term, without any settlement or liquidation of the partnership affairs, there is a statutory presumption that the partnership will continue in existence as between those partners¹. However, the terms upon which the partnership will continue will depend upon whether the continuation stems simply from a dissolution caused by the expiry of a fixed term² where the partners (or such of them as habitually acted in it during the term) carry on as before, or whether the reason for the continuation stems not from the expiry of a fixed term but from the admission or departure of a partner³.

In the former case, where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement⁴, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will⁵. Among provisions which are consistent with these incidents are an arbitration clause⁶, a power to nominate a successor⁷ and, as a general rule, a right of pre-emption⁸. Provisions suitable to an agreement for a term of years are not so consistent, such as clauses in the nature of penalties⁹ and, in some cases, rights of pre-emption¹⁰. The mode of realisation of assets prescribed by an agreement for a term of years may not apply to a dissolution at the end of a subsequent partnership at will¹¹; and a surety for one of the partners is discharged by the new agreement for partnership at will which is implied by the continuation of the firm after the term has expired¹². Clauses providing for the expulsion of a partner may be regarded as consistent with the incidents of a partnership at will so as to survive the expiry of a fixed term, but the position is not clear¹³.

In the latter case, where there has been a dissolution caused by the admission or departure of a new partner, there is no such presumption, and the terms of the new partnership, unless contrary agreement is reached between the partners¹⁴, will be those applicable under the Partnership Act 1890¹⁵.

1 Partnership Act 1890 s 27(2); and see PARA 205. See also *Stekel v Ellice* [1973] 1 All ER 465, [1973] 1 WLR 191. In *Hudgell Yeates & Co v Watson* [1978] QB 451, [1978] 2 All ER 363, CA, a partnership was dissolved by operation of law when one partner became unqualified, and it was held that a new partnership among the others commenced immediately. As to the position on dissolution see PARA 205. Once it has been found that a partner leaving a partnership has effectively agreed to retire, this will ex hypothesi imply the continuation of the partnership, albeit as newly constituted; and such retiring partner will not be entitled to a claim for an account and winding up of the firm: *Sobell v Boston* [1975] 2 All ER 282, [1975] 1 WLR 1587; and see *Brown v Rivlin* [1983] CA Transcript 56.

2 See PARA 43.

3 As to admission of partners see PARA 112 et seq.

4 As to what may constitute an express new agreement see *Walters v Bingham, Bingham v Walters* [1988] 1 FTLR 260 (where it was held that a resolution at a partners' meeting, pending the adoption of a new partnership agreement, to continue upon the terms of a draft deed of partnership, which was, like the original term of the partnership, expressed to continue for a fixed term (a term which had already expired as at the date of the partners' meeting), was sufficient to constitute an express new agreement, thus negating the implication that the partnership continued as a partnership at will).

5 Partnership Act 1890 s 27(1). See *King v Chuck* (1853) 17 Beav 325; *Essex v Essex* (1855) 20 Beav 442; *Cox v Willoughby* (1880) 13 ChD 863; *Neilson v Mossend Iron Co* (1886) 11 App Cas 298, HL; *Daw v Herring* [1892] 1 Ch 284; *Campbell v Campbell* (1893) 6 R 137, HL; *Murphy v Power* [1923] 1 IR 68, Ir CA (where

alternative rights were given, one of which was obviously inapplicable to a partnership at will, and it was held that the benefit of the other alternative could not be claimed). As to the meaning of 'partnership at will' see PARA 43.

6 *Cope v Cope* (1885) 52 LT 607; *Gillett v Thornton* (1875) LR 19 Eq 599.

7 *Cuffe v Murtagh* (1881) 7 LR Ir 411.

8 *Brooks v Brooks* (1901) 85 LT 453; *M'Gown v Henderson* 1914 SC 839.

9 *Hogg v Hogg* (1876) 35 LT 792.

10 *Yates v Finn* (1880) 13 ChD 839, explained in *Daw v Herring* [1892] 1 Ch 284 at 289, 290 per Stirling J; *Murphy v Power* [1923] 1 IR 68, Ir CA.

11 *Woods v Lamb* (1866) 35 LJ Ch 309.

12 *Small v Currie* (1854) 18 Jur 731.

13 *Clark v Leach* (1862) 32 Beav 14; affd (1863) 1 De GJ & Sm 409, not followed in *Walters v Bingham*, *Bingham v Walters* [1988] 1 FTLR 260.

14 See *Hensman v Traill* (1980) 124 Sol Jo 776 (overruled on other grounds by *Kerr v Morris* [1987] Ch 90, [1986] 3 All ER 217, CA), where it was held that, following the retirement of one of the partners, and in light of the continuing two doctors' conduct thereafter, the two continued in partnership together upon all the old terms save as to the unilateral covenant in restraint of trade which one of the partners had expressly objected to, following the third partner's retirement. See also *Walters v Bingham*, *Bingham v Walters* [1988] 1 FTLR 260 and *Watts (t/a A A Watts) v Hart (Inspector of Taxes)* [1984] STC 548 (where, with the exception of its land, the assets of a partnership were transferred to a limited company and then, on the company's liquidation, back to the partnership; it was held that, since the partnership had continued to trade during these transfers, the land remained an asset of the partnership and continued throughout to be held on the original basis, namely, as trading stock, not merely as an investment).

15 *Firth v Amslake* (1964) 108 Sol Jo 198 (where, following the entry of a third partner into the practice, one of the two original partners refused to agree to various terms of the new draft partnership deed that was subsequently drawn up; it was held (and despite the fact that all three partners had agreed in principle to sign the draft when it had subsequently been drawn up by the firm's solicitors) that the new three-partner firm had superseded the old two-partner firm so that, since there was no express agreement as to the terms upon which this new partnership would be operated, a partnership at will, governed by the provisions of the Partnership Act 1890, arose); cf *Austen v Boys* (1857) 24 Beav 598 (affd (1858) 2 De G & J 626); *Zamikoff v Lundy* [1970] 2 OR 8, 9 DLR (3d) 637 (affd sub nom *Whisper Holdings Ltd v Zamikoff* [1971] SCR 933, 19 DLR (3d) 114) (new partner's conduct explicable only on the basis that they had accepted that the partnership was governed by the original partnership agreement).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/A. GENERAL PRINCIPLES/45. Authority of partners founded on agency.

2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS

(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS

(i) Contractual Liability

A. GENERAL PRINCIPLES

45. Authority of partners founded on agency.

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership¹. The acts of every partner who does any act for carrying on, in the usual way, business of the kind carried on by the firm of which he is a member bind the firm and his partners², unless the partner so acting has no authority to act for the firm in a particular matter, and the person with whom he is dealing knows that he has no authority, or does not know or believe him to be a partner³. An act done by any partner within the scope of his actual or implied authority renders the other partners liable to persons dealing with him as representing the firm⁴.

Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner⁵.

A sleeping partner is bound by contracts made by the ostensible partners in the ordinary course of the partnership business⁶. A partner cannot escape liability by merely giving notice that he has sold his share in the business when he has not in fact done so⁷. The death of a partner does not preclude the surviving partner or partners from drawing on the partnership account⁸.

1 Partnership Act 1890 s 5; *British Homes Assurance Corpn Ltd v Paterson* [1902] 2 Ch 404. Because of this basic principle it was held in *Re Scientific Investment Pension Plan, Clark v Hicks* (1992) Times, 10 December that, where a solicitor procured the services of partners in his own firm in order to assist him in carrying out his duties as a trustee of a pension plan, he was not an independent trustee as required by the Social Security Pensions Act 1975 and the regulations thereunder. In *Central Motors (Birmingham) v PA & SNP Wadsworth (t/a Pensagain)* [1982] CA Transcript 231, it was held that by reason of the agency which exists between partners, a cheque signed by one partner, below the printed name of the firm, was sufficient to bind the firm, notwithstanding that the firm's bank mandate required both partners to sign each cheque; (obiter) but that, where such agency does not exist, the bank must honour the mandate that it has with its customer. As to the principles of agency see further **AGENCY**.

2 Partnership Act 1890 s 5; *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103. The substance and detail of a transaction must be examined to see whether it is the kind of transaction forming part of the ordinary business of a partner: *JJ Coughlan v Ruparelia* [2003] EWCA Civ 1057, [2003] All ER (D) 344 (Jul). Once a partnership had treated a particular transaction as part of its business then, whether or not that transaction was part of the regular business of the partnership, the transaction became part of the partnership business, with the consequence that the partnership was bound not merely by the transaction but also by any other liabilities connected with the transaction: *Governor and Co of the Bank of Scotland v Henry Butcher & Co* [2003] EWCA Civ 67, [2003] 2 All ER (Comm) 557.

The Partnership Act 1890 s 5 does not override the statutory provisions (see **CONTRACT** vol 9(1) (Reissue) PARA 623 et seq) requiring a contract to be evidenced by a note or memorandum in writing signed by the party to be charged or by some person lawfully authorised by him to sign: *Brettel v Williams* (1849) 4 Exch 623; *Keen v Mear* [1920] 2 Ch 574.

3 Partnership Act 1890 s 5. As to limitations on authority see PARAS 46, 59. As to the liability of the firm for wrongs committed by a partner acting in the ordinary course of business of the firm or with the authority of his co-partners see s 10; and PARA 75.

4 *Bottomley v Nuttall* (1858) 5 CBNS 122. Cf the Partnership Act 1890 s 6 (see PARA 58) and *Land v Burton* (1935) 79 Sol Jo 180, where it was held that the receipt by a partner of a deposit from a person seeking employment in the firm was not within the ordinary course of the partnership business of estate agents, surveyors and valuers, and accordingly did not render another partner who had attempted to dissolve the partnership liable. See also *United Bank of Kuwait v Hammoud*, *City Trust Ltd v Levy* [1988] 3 All ER 418, [1988] 1 WLR 1051, CA (salaried partner in a firm of solicitors gave undertakings to provide security for various loans; the lenders, having been led to believe that the requests of the firm's clients arose out of exchange control and property transactions, which were matters upon which a solicitor's advice might be sought, were held entitled to enforce the undertakings against the firm; the solicitor had ostensible authority to act for the firm in the manner in which he had in giving the undertakings). In that case, however, since the partner concerned appeared only to be a salaried partner, the Partnership Act 1890 s 5 should not have applied to him in any event (see PARA 76 note 5), although the point does not appear to have been raised in argument on either side.

5 Partnership Act 1890 s 16; and see *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103. It appears that service on a partner of a copy of the memorandum formerly required by the Moneylenders Act 1927 s 6(1) (repealed) was not service on another partner: see *John W Grahame (English Financiers) Ltd v Ingram* [1955] 2 All ER 320 at 322, [1955] 1 WLR 563 at 565-566, CA. The reason for the exception of fraud is that a fraudulent partner is unlikely to fulfil the duty of passing on the notice to the other partners: see *Re Hampshire Land Co* [1896] 2 Ch 743 at 749, approved in *Houghton & Co v Nothard Lowe and Wills Ltd* [1928] AC 1 at 15, HL, and applied in *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459 at 471, [1954] 1 All ER 779 at 784, 785. See **COMPANIES** vol 14 (2009) PARA 127.

6 *Beckham v Drake* (1841) 9 M & W 79 (affd on this point (1843) 11 M & W 315, Ex Ch); *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103. As to the meaning of 'sleeping partner' see PARA 4.

7 *Vice v Fleming* (1827) 1 Y & J 227. It would be otherwise if the notice were held to amount to an unqualified restriction of future liability: *Vice v Fleming*.

8 *Backhouse v Charlton* (1878) 8 ChD 444.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/A. GENERAL PRINCIPLES/46. Limitations on authority of partners.

46. Limitations on authority of partners.

If it has been agreed between the partners that any restriction is to be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement¹. The express or implied authority of a partner cannot, however, be limited by a private arrangement between the partners of which the person dealing with the partner has no notice², except where the limitation is imposed upon a partner who is not known or believed by that person to be a partner³.

An agreement by one partner to transact business in an unusual way does not bind his partners who have not authorised and have no notice of that agreement⁴.

A partner cannot delegate his authority without the consent, whether express or implied, of his partners⁵. Acts prima facie within his implied authority do not bind him or his firm if the person he deals with knows he has no such authority⁶.

¹ Partnership Act 1890 s 8. See also *Lord Gallway v Mathew and Smithson* (1808) 10 East 264; *Alderson v Pope* (1808) 1 Camp 404n; and PARA 64 text and note 1.

² *Edmunds v Bushell and Jones* (1865) LR 1 QB 97; cf *Hambro v Burnand* [1904] 2 KB 10, CA; *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103.

³ See the Partnership Act 1890 s 5; cf *Lloyds Bank Ltd v Swiss Bankverein, Union of London and Smiths Bank Ltd v Swiss Bankverein* (1912) 107 LT 309 at 313 per Hamilton J (affd (1913) 108 LT 143, CA). It was said in *Watteau v Fenwick* [1893] 1 QB 346 (a case of agency) that an undisclosed principal was liable for the acts of his agent, even though the agent was neither held out as such, nor expressly authorised, but the dictum must be regarded as of doubtful authority: see *Kinahan & Co Ltd v Parry* [1910] 2 KB 389 (revsd [1911] 1 KB 459, CA); *Lloyds Bank Ltd v Swiss Bankverein, Union of London and Smiths Bank Ltd v Swiss Bankverein*. As to the circumstances in which a person dealing with someone in a firm is entitled to treat that person as a partner of the firm see *United Bank of Kuwait v Hammoud, City Trust Ltd v Levy* [1988] 3 All ER 418, [1988] 1 WLR 1051, CA.

⁴ *Bignold v Waterhouse* (1813) 1 M & S 255 (agreement to carry parcels free of charge); cf *Land v Burton* (1935) 79 Sol Jo 180; *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103.

⁵ *Re Robinson, ex p Holdsworth* (1841) 1 Mont D & De G 475.

⁶ See PARA 64.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/47. Extent of implied authority.

B. INSTANCES OF IMPLIED AUTHORITY

47. Extent of implied authority.

The implied authority of partners will be affected by any special course of dealing, but apart from this it will not extend to anything done otherwise than in the usual course of the partnership business¹ and in the way in which it would usually be done in businesses of that kind². Thus, a bill given by a partner in respect of transactions not relating to the partnership does not render his partners liable³.

Where the nature of the partnership has been defined or agreed upon, no partner has implied authority to compel the others to embark in a different business⁴. Nor can a change be made in the nature of the partnership business without either an express agreement or the consent of all existing partners⁵. A partner has no implied authority to make his co-partners partners with another person in another business, but may bind them to a partnership with another person for a single venture⁶.

A managing partner has authority to defend a claim brought against the firm which relates to its usual business⁷.

1 *Hasleham v Young* (1844) 5 QB 833. A partner who enters into any contract, eg a bond which is outside the scope of his authority, does not bind his firm but renders himself liable; *Fortune v Young* 1918 SC 1. What is 'usual' in the type of business in question may vary from time to time: see eg *United Bank of Kuwait v Hammoud, City Trust Ltd v Levy* [1988] 3 All ER 418, [1988] 1 WLR 1051, CA (implied authority of solicitors to give an undertaking); *National Commercial Banking Corp of Australia Ltd v Batty* (1986) 65 ALR 385, Aust HC; and PARA 75. An assurance by a solicitor that his undertaking is given in the usual course of business is not sufficient to bind his partner where, on an objective view, the undertaking had not been given in relation to an underlying transaction of a kind which was part of the usual business of a solicitor: *Hirst v Etherington* [1999] 3 All ER 797, [1999] 31 LS Gaz R 42, CA. See also *Customs and Excise Comrs v Evans (t/a The Grape Escape Wine Bar)* [1982] STC 342 at 349 (where Glidewell J said obiter that an appeal against a VAT assessment entered into and prosecuted by one partner alone would bind the firm); *Re Sutherland & Partners' Appeal* [1994] STC 387, CA (one of six partners entitled to appeal against the Commissioners of Inland Revenue notwithstanding the fact that the partner's five co-partners objected to the appeal); *Mephistopheles Debt Collection Service (a firm) v Lotay* [1994] 26 LS Gaz R 36, CA (where partners sue in the firm's name, an appeal is an application 'brought by' all the partners). As to a firm's capacity to sue see PARA 79 et seq. As to the authority of a partner in a firm of solicitors to sign a bill of costs due to that firm see the Solicitors Act 1974 s 69(1), (2)(a); *Bartletts De Reya v Byrne* (1983) 127 Sol Jo 69; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 956.

2 *Kirk v Blurton* (1841) 9 M & W 284, referred to in *Forbes v Marshall* (1855) 11 Exch 166, and in *Stephens v Reynolds* (1860) 5 H & N 513 at 517 per Martin B; *Nicholson v Ricketts* (1860) 2 E & E 497. See *Re Land Credit Co of Ireland, Weikersheim's Case* (1873) 8 Ch App 831; *Niemann v Niemann* (1889) 43 ChD 198, CA (acceptance of shares); *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103. As to the implied authority of a partner to insure see **INSURANCE** vol 25 (2003 Reissue) PARA 279.

3 *Re Prothero, ex p Agace* (1792) 2 Cox Eq Cas 312.

4 *Natusch v Irving* (1824) 2 Coop temp Cott 358. An example is adding marine insurance to life and fire insurances: *Singleton v Knight* (1888) 13 App Cas 788, PC.

5 See the Partnership Act 1890 s 24(8); and PARA 110.

6 *Mann v D'Arcy* [1968] 2 All ER 172, [1968] 1 WLR 893.

⁷ *Tomlinson v Broadsmith* [1896] 1 QB 386, CA. As to claims against partners and firms generally see PARA 84 et seq.

UPDATE

47 Extent of implied authority

NOTE 1--Solicitors Act 1974 s 69(1) amended, s 69(2) now s 69(2)-(2F): Legal Services Act 2007 Sch 16 para 64(2), (3). See further **LEGAL PROFESSIONS** vol 66 (2008) PARAS 956, 962, 964.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/48. Acts beyond implied authority.

48. Acts beyond implied authority.

A partner has no implied authority to execute deeds on behalf of his firm¹. Nor does the implied authority of a partner extend to acts not usually incidental to the scope of the partnership business, for example the giving of guarantees by a member of a trading firm². A partner has authority to lend the firm's money upon mortgage when such a transaction is part of the ordinary business of the firm³, but a partner has, as a rule, no authority to take as security any property to which a liability is attached⁴. Although a partner may bind his co-partners to a partnership with a third person for a single venture, he has no authority to bind them to a partnership carrying on another business⁵. A solicitor has no implied authority to accept an appointment as a trustee⁶.

1 *Harrison v Jackson* (1797) 7 Term Rep 207; *Marchant v Morton, Down & Co* [1901] 2 KB 829. Although a deed executed by one partner who has implied authority to borrow money may not be valid as a legal mortgage, it may, however, create a good equitable security: *Re Boyd, Re Wilson and Vause, ex p Bosanquet* (1847) De G 432; *Re Briggs & Co, ex p Wright* [1906] 2 KB 209. See also the Partnership Act 1890 s 6 and PARA 58. Even if a partner does have express authority to execute deeds on behalf of his firm, it may yet be very difficult to render his co-partners liable under any deed executed by him; the form of the deed will ultimately determine whether the firm as a whole is bound: see *Marchant v Morton, Down & Co* [1901] 2 KB 829. See also *Combes' Case* (1613) 9 Co Rep 75a; *Wilks v Back* (1802) 2 East 140; *Appleton v Binks* (1804) 5 East 148; *Hall v Bainbridge* (1840) 1 Man & G 42; *Re International Contract Co, Pickering's Claim* (1871) 6 Ch App 525.

2 See PARA 49. For other examples of what may come within a partner's implied authority see the cases cited in PARA 47 notes 1-7.

3 *Re Land Credit Co of Ireland, Weikersheim's Case* (1873) 8 Ch App 831.

4 See *Niemann v Niemann* (1889) 43 ChD 198, CA (where it was held that, in the absence of special authority, there was no power for one partner to accept shares in a company, even if fully paid up, in satisfaction of a debt owed to the firm). See, however, *Re Land Credit Co of Ireland, Weikersheim's Case* (1873) 8 Ch App 831 (shares accepted by a partner in a firm of bankers).

5 *Re European Society Arbitration Acts, ex p British Nation Life Assurance Association Liquidators* (1878) 8 ChD 679; *Mann v D'Arcy* [1968] 2 All ER 172, [1968] 1 WLR 893.

6 *Re Bell's Indenture, Bell v Hickley* [1980] 3 All ER 425 at 437, [1980] 1 WLR 1217 at 1230 per Vinelot J, citing *Re Fryer, Martindale v Picquot* (1857) 3 K & J 317.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/49. Guarantees.

49. Guarantees.

A partner in a trading firm does not have implied authority to give guarantees where such acts are not incidental to the scope of the partnership business¹. A guarantee signed by one partner in the firm name does not bind the other partners unless it is in the regular line of business of the firm, or unless he has their express authority to give the guarantee². However, in the absence of express authority, it may be sufficient that the partners were subsequently informed of the guarantee³. A continuing guarantee or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guarantee or obligation was given⁴.

1 *Duncan v Lowndes and Bateman* (1813) 3 Camp 478; *Hasleham v Young* (1844) 5 QB 833; *Brettel v Williams* (1849) 4 Exch 623. See also PARA 48.

2 *Crawford v Stirling* (1802) 4 Esp 207; *Sandilands v Marsh* (1819) 2 B & Ald 673; *Brettel v Williams* (1849) 4 Exch 623; *Re Smith, Fleming & Co, ex p Harding* (1879) 12 ChD 557, CA.

3 *Governor and Co of the Bank of Scotland v Henry Butcher & Co* [2003] EWCA Civ 67, [2003] 2 All ER (Comm) 557.

4 Partnership Act 1890 s 18; but see *Universal Co v Yip* [1986] CA Transcript 581 (where it was held that the guarantee that had been given by the defendant to a firm was not revoked by reason of the firm's having been sold and its assets transferred to a limited company). As to guarantee and indemnity see generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1013 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/50. Bills of exchange.

50. Bills of exchange.

A partner in a trading firm has implied authority to draw, accept and indorse bills of exchange and other negotiable instruments on behalf of his firm in the ordinary course of its business¹, but not otherwise²; and the firm is liable even if the transaction is fraudulent and unauthorised, if the holder has no notice of such fraud³. Save in relation to cheques⁴ this implied authority does not, however, extend to firms which are not trading partnerships, such as solicitors⁵ or commission agents⁶. The fact that a bill is given for a partner's private debt raises a presumption that he had no authority to sign the name of the firm for that purpose and throws the burden of proving such authority on the holder of the bill⁷; and the holder of a bill purporting to bind a firm will be restrained from negotiating it if he knows that it is in fact unauthorised or fraudulent⁸. If, however, a bill is taken in good faith without such knowledge at the time, subsequent knowledge of the misconduct of the partner in giving the security is immaterial⁹.

1 *Harrison v Jackson* (1797) 7 Term Rep 207 at 210; *Williamson v Johnson* (1823) 1 B & C 146. The inference to be drawn from a partner signing a printed firm cheque is that he is drawing a cheque on the firm: *Ringham v Hackett* (1980) 124 Sol Jo 201, CA, applied in *Central Motors (Birmingham) v PA & SNP Wadsworth (t/a Pensagain)* [1982] CA Transcript 231 (signature on a cheque below the printed name of the firm by one partner alone bound the firm notwithstanding that, by the firm's mandate, the signature of both partners was required). As to bills of exchange and other negotiable instruments see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq.

2 *Re Cunningham & Co Ltd, Simpson's Claim* (1887) 36 ChD 532.

3 *Lane v Williams* (1692) 2 Vern 277; *Sutton v Gregory* (1797) Peake Add Cas 150; *Arden v Sharpe and Gilson* (1797) 2 Esp 524; *Wells v Masterman* (1799) 2 Esp 731; *Musgrave v Drake* (1843) 5 QB 185, (1843) 1 Dav & Mer 347; *Wiseman v Easton* (1863) 8 LT 637; *Hogg v Skeen* (1865) 18 CBNS 426; *Bunarsee Dass v Gholam Hossein* (1870) 13 Moo Ind App 358 at 363, PC; *Garland v Jacomb* (1873) LR 8 Exch 216. See PARA 60.

4 See *Laws v Rand* (1857) 3 CBNS 442; *Backhouse v Charlton* (1878) 8 ChD 444; and see *Ringham v Hackett* (1980) 124 Sol Jo 201, CA (no distinction between trading and non-trading partnerships made).

5 *Hedley v Bainbridge* (1842) 3 QB 316; *Garland v Jacomb* (1873) LR 8 Exch 216. Nor has a partner in a firm of solicitors implied authority to give a post-dated cheque: *Forster v Mackreth* (1867) LR 2 Exch 163. As to solicitors generally see **LEGAL PROFESSIONS**. As to what may constitute a trading partnership see PARA 6 note 1.

6 *Yates v Dalton* (1858) 28 LJ Ex 69; and see **AUCTION** vol 2(3) (Reissue) PARA 202.

7 *Ridley v Taylor* (1810) 13 East 175; *Frankland v M'Gusty* (1830) 1 Knapp 274, PC; *Leverson v Lane* (1862) 13 CBNS 278.

8 *Hood v Aston* (1826) 1 Russ 412.

9 *Swan v Steele* (1806) 7 East 210.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/51. Borrowing money.

51. Borrowing money.

The implied power of a partner extends to the borrowing of money for the purposes of the business, where the business is of a kind that cannot be carried on in the usual way without such a power¹, but not for the purpose of providing the capital to be contributed by any individual partner². Where the limit of contribution is fixed by express agreement among the partners, a partner cannot, at all events as between himself and his partners, bind them by borrowing beyond the stipulated sum³.

1 See eg *Fisher v Tayler* (1843) 2 Hare 218 (on appeal (1843) 2 LTOS 205); *Bank of Australasia v Breillat* (1847) 6 Moo PCC 152 at 194 (ordinary trading partnerships). As to what may constitute a trading partnership see PARA 6 note 1. As to mining partnerships see *Dickinson v Valpy* (1829) 10 B & C 128; *Ricketts v Bennett and Field* (1847) 4 CB 686 and the cases there cited. As to borrowing, for the purposes of the firm, by a partner in his own name see PARA 61. See also **MORTGAGE** vol 77 (2010) PARA 165 et seq.

2 *Greenslade v Dower* (1828) 1 Man & Ry KB 640.

3 *Re Worcester Corn Exchange Co* (1853) 3 De GM & G 180 at 187.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/52. Pledging assets for partnership debt.

52. Pledging assets for partnership debt.

A surviving partner can give a valid security on the partnership assets for a partnership debt incurred before the death of his partner¹. Moreover, this is a general power which a partner continues to possess after the dissolution of the partnership of which he is member in so far as the exercise of such power may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise². In such a case the firm is, however, not bound by the acts of a partner who has become bankrupt³; nor after the appointment of a receiver by the court may a partner deal with the partnership assets so as to create a valid security⁴.

1 *Re Clough, Bradford Commercial Banking Co v Cure* (1885) 31 ChD 324.

2 Partnership Act 1890 s 38; *Re Litherland, ex p Howden* (1842) 2 Mont D & De G 574; *Butchart v Dresser* (1853) 4 De GM & G 542; *Brown v Kidger* (1858) 3 H & N 853; *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427, CA. The authority of a partner in these circumstances to pledge the partnership property does not enable him to bind his partners personally (*Blaine v Holland* (1889) 60 LT 285, PC); nor are the other partners liable if the advances have been made solely on the credit of the borrowing partner and not on that of the partnership, and the application of the money to the purposes of the partnership does not in itself make it liable (*Emly v Lye* (1812) 15 East 7; *Smith v Craven* (1831) 1 Cr & J 500).

3 Partnership Act 1890 s 38 proviso. Section 38 proviso does not, however, affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt: s 38 proviso.

4 *Hills v Reeves* (1882) 30 WR 439; affd 31 WR 209, CA. As to the appointment of a receiver see PARA 162.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/53. Pledging partnership credit or assets for private debt.

53. Pledging partnership credit or assets for private debt.

Where one partner pledges the firm's credit for a purpose apparently not connected with its ordinary course of business¹, the firm is not bound unless he is in fact specially authorised by the other partners². Therefore, a partner who holds shares as trustee for his firm cannot give a valid charge upon them for his private debt to a lender who knows that they belong to the firm³; but, if he has power to borrow money, he can give a charge on partnership property for his own debt to a person who has no notice that the property is not his own⁴; and, prima facie, a person who in good faith lends to such a partner on the credit of the partnership is entitled to assume that the transaction is for partnership purposes and authorised, unless he has notice of suspicious circumstances which ought to put him on inquiry⁵. A partner who has pledged the firm's assets for his private debt may not sue, as a member of the firm, to set aside the transaction⁶.

1 Note that the Partnership Act 1890 refers to a purpose 'connected with' the firm's ordinary course of business. As to what may be held to be in the ordinary course of business see PARAS 45, 75.

2 Partnership Act 1890 s 7. Section 7 does not, however, affect any personal liability incurred by an individual partner: s 7. See also **MORTGAGE** vol 77 (2010) PARA 162 et seq.

3 *Wilkinson v Eykyn* (1866) 14 WR 470.

4 *Tupper v Haythorne* (1815) Gow 135n; *Raba v Ryland* (1819) Gow 132. Such assignment is, however, subject to the partnership debts: *Young v Keighley* (1808) 15 Ves 557.

5 *Reid v Hollinshed* (1825) 7 Dow & Ry KB 444; *Loyd v Freshfield* (1826) 2 C & P 325; *Okell v Eaton and Okell* (1874) 31 LT 330.

6 *Brownrigg v Rae* (1850) 5 Exch 489. An innocent partner may, however, obtain equitable relief: *Midland Rly Co v Taylor* (1862) 8 HL Cas 751; *Piercy v Fynney* (1871) LR 12 Eq 69.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/54. Receipt of debts owing to the firm.

54. Receipt of debts owing to the firm.

A partner has implied authority to receive and give a good discharge for debts due to his firm, but not for a debt owing to one of his partners in his personal capacity¹. If the partners appoint a person to receive partnership debts, their own implied authority is not revoked².

A payment by a debtor of the partnership to one of the partners is prima facie a payment to the partnership³.

1 *Powell v Brodhurst* [1901] 2 Ch 160.

2 *Bristow and Porter v Taylor* (1817) 2 Stark 50.

3 *Moore v Smith* (1851) 14 Beav 393.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/55. Release of debts and compromise of claims.

55. Release of debts and compromise of claims.

Where payment of a debt owing to a firm has been made, a partner in that firm has implied authority to release that debt¹, even where it is released by deed executed by him 'for self and partner'²; but under normal principles a mere covenant not to sue by one partner only does not release a partnership debt³, and a partner has no implied authority to discharge a separate debt of his own by agreeing that it should be set off against a debt due to his firm⁴. A release, not by deed, of one partner by a creditor of the firm does not necessarily release the other partners⁵, but a release, by receipt, of one debtor on a joint and several judgment debt has been held to release his co-debtor, where there was no ground for importing into the document an intention to reserve rights against the co-debtor⁶. In the absence of fraud, one partner may release a cause of action in which he and his partners are claimants⁷, but he must have express authority to consent to judgment⁸, or to refer a dispute to arbitration⁹ or to compromise a claim¹⁰. A managing partner has implied authority to defend a claim against the firm in relation to the partnership business¹¹.

1 *Hawkshaw v Parkins* (1819) 2 Swan 539; and see **CONTRACT** vol 9(1) (Reissue) PARA 1088.

2 *Wilkinson v Lindo* (1840) 7 M & W 81.

3 *Hutton v Eyre* (1815) 6 Taunt 289; *Walmesley v Cooper* (1839) 11 Ad & El 216.

4 *Kendal v Wood* (1870) LR 6 Exch 243; *Piercy v Fynney* (1871) LR 12 Eq 69.

5 *Re Armitage, ex p Good* (1877) 5 ChD 46, CA. An example is where the surrounding circumstances show that the release was limited: see *Re EWA* [1901] 2 KB 642 at 652, CA, per Collins LJ.

6 *Re EWA* [1901] 2 KB 642, CA. As to guarantee and indemnity see generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1013 et seq.

7 *Arton v Booth* (1820) 4 Moore CP 192; *Furnival v Weston* (1822) 7 Moore CP 356; *Barker v Richardson* (1827) 1 Y & J 362. As to claims by partners and firms see PARA 79 et seq.

8 *Hambidge v De la Crouée* (1846) 3 CB 742; cf *Munster v Cox* (1885) 10 App Cas 680, HL.

9 *Stead v Salt* (1825) 3 Bing 101; *Re Crowder, ex p Nolte* (1826) 2 Gl & J 295; *Adams v Bankart* (1835) 1 Cr M & R 681; *Hatton v Royle* (1858) 3 H & N 500. In *Thomas v Atherton* (1878) 10 ChD 185, CA, the co-partners were bound by acquiescence. A reference to arbitration may perhaps be described as being a usual way of carrying on a particular partnership business so as to bring the matter within the scope of the authority of a partner.

10 *Crane v Lewis* (1887) 36 WR 480. A release in compromise of a claim against one partner for damages for a joint tort may release all the members of the firm: *Howe v Oliver* (1908) 24 TLR 781; *Brinsmead v Harrison* (1872) LR 7 CP 547.

11 *Tomlinson v Broadsmith* [1896] 1 QB 386, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/56. Payment of firm's debts.

56. Payment of firm's debts.

Each partner has implied authority to pay debts owing by the firm¹. Part payment of a debt by a partner may be presumed to have been made by him as agent of the firm, and may, therefore, prevent a limitation period from running in favour of his partners².

1 The authority of partners is founded on agency: see PARA 45.

2 *Goodwin v Parton and Page* (1880) 42 LT 568, CA. As to the effect which part payment of debts, or payment of interest on debts, by a continuing partner has on the position of a retired partner, see **LIMITATION PERIODS** vol 68 (2008) PARA 1209.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/B. INSTANCES OF IMPLIED AUTHORITY/57. Powers of attorney.

57. Powers of attorney.

A general power of attorney¹ in favour of one member of a firm does not confer any authority on his partners². Nor does it generally impose any liability on the firm for his wrongful acts in the exercise of the power³. A power of attorney by one partner to another, authorising him to sell all or any of the donor's property, enables him to sell the partnership property⁴. A power of attorney for the purpose of exercising the powers and privileges under a specified deed of partnership has been held not to authorise a notice of dissolution and an assignment of the partnership assets⁵.

1 As to powers of attorney generally see **AGENCY** vol 1 (2008) PARA 16.

2 *Edmiston v Wright* (1807) 1 Camp 88. Where a donor who carried on business on his own account and also in partnership executed two powers of attorney in favour of his wife authorising her to indorse and to accept bills, she was held not to be authorised to accept bills for the purpose of the partnership: *Attwood v Munnings* (1827) 7 B & C 278. Cf *Jacobs v Morris* [1902] 1 Ch 816, CA.

3 *Chilton v Cooke & Sons* (1877) 37 LT 607.

4 *Hawksley v Outram* [1892] 3 Ch 359, CA.

5 *Harper v Godsell* (1870) LR 5 QB 422.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/C. ACTS DONE BY AUTHORISED PERSON IN THE FIRM NAME/58. Acts done and documents executed in the firm name.

C. ACTS DONE BY AUTHORISED PERSON IN THE FIRM NAME

58. Acts done and documents executed in the firm name.

An act or instrument relating to the business of the firm done or executed in the firm name¹, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners². A deed executed by one partner for himself and his partner in the presence of the latter binds both³.

Where, however, goods ordered by two partners in the joint partnership name are delivered to one only and accepted by him on behalf of another business of his own, the other partner is not liable for their price⁴. Similarly, where a partner, acting on behalf of the firm, makes a contract of a personal character for a term of years with a person who does not know of the partnership, that person can put an end to the contract on the death of the partner⁵.

1 Statute may make provision for a firm's signature on instruments executed on behalf of the firm: see eg the Solicitors Act 1974 s 69(1), (2)(a); *Bartletts De Reya v Byrne* (1983) 127 Sol Jo 69; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 956. As to the firm name see PARA 7.

2 Partnership Act 1890 s 6; and see the cases cited in PARA 60 note 3. The general rules of law relating to the execution of deeds and negotiable instruments are not affected by this provision: s 6 proviso. As to bills of exchange and other negotiable instruments see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq. As to deeds generally see **DEEDS AND OTHER INSTRUMENTS**. As to what acts are within a partner's implied authority for the purposes of s 5 (and, therefore, what actions by a partner will bind his firm) see generally PARAS 47-57.

3 *Ball v Dunsterville* (1791) 4 Term Rep 313; *Burn v Burn* (1798) 3 Ves 573 at 578. As to the execution of deeds generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 27 et seq. As to whether a partner has implied authority to execute a deed on behalf of his firm see PARA 48.

4 *Re Christopher, ex p Harris* (1816) 1 Madd 583 (where, as the deliverers of goods knew, there had been a dissolution of the firm in the interval between the order for and the delivery of the goods in question). As to the liability of a retired partner generally see PARA 77.

5 *Robson v Drummond* (1831) 2 B & Ad 303; cf *Stevens v Benning* (1854) 1 K & J 168 (affd (1855) 6 De GM & G 223).

UPDATE

58 Acts done and documents executed in the firm name

NOTE 1--Solicitors Act 1974 s 69(1) amended, s 69(2) now s 69(2)-(2F): Legal Services Act 2007 Sch 16 para 64(2), (3). See further **LEGAL PROFESSIONS** vol 66 (2008) PARAS 956, 962, 964.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/D. ACTS DONE IN NAME OF INDIVIDUAL PARTNER/59. Contracts and execution of documents.

D. ACTS DONE IN NAME OF INDIVIDUAL PARTNER

59. Contracts and execution of documents.

A partner cannot bind the others by a guarantee apparently unconnected with the partnership¹, but he may do so where a mutual authority is proved by a previous course of practice of, or by adoption of, the partners, or by the usage of similar partnerships². An approval of a draft agreement signed by one member of a firm may bind the other partners³, and a contract for a lease signed by one partner has been held to bind the others where an analogous oral contract had been entered into and possession taken by all⁴.

1 *Duncan v Lowndes and Bateman* (1813) 3 Camp 478; *Hasleham v Young* (1844) 5 QB 833. As to the execution of deeds by a partner on behalf of the firm as a whole, and as to the extent to which such a deed will bind his co-partners, see PARA 48 note 1.

2 *Brettel v Williams* (1849) 4 Exch 623 at 629, 630, commenting on *Ex p Gardom* (1808) 15 Ves 286.

3 *Brogden v Metropolitan Rly Co* (1877) 2 App Cas 666, HL.

4 *Sharp v Milligan* (1856) 22 Beav 606; and see *City of London Gas Light and Coke Co v Nicholls* (1826) 2 C & P 365 (all partners liable for the gas supplied to the firm's place of business although leased to one of them only). A deed signed by one partner only, not as an escrow, may bind him, even though it is not binding on the others: *Bowker v Burdekin* (1843) 11 M & W 128; and see *Cumberlege v Lawson* (1857) 1 CBNS 709; *Lascaridi v Gurney* (1863) 9 Jur NS 302; *Fortune v Young* 1918 SC 1; *Harrison v Povey, London County Freehold and Leasehold Properties Ltd v Harrison and Povey* (1956) 168 Estates Gazette 613.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/D. ACTS DONE IN NAME OF INDIVIDUAL PARTNER/60. Bills of exchange.

60. Bills of exchange.

A bill drawn on a firm, and accepted by a partner in the firm's name and in his own, may bind the firm, but, if it does so, it does not bind him separately¹. A bill given for partnership purposes by a partner in his own name, and not in the firm's name, does not bind the other partners²; but, if given in a name which the court finds to be intended for and substantially identical with, or habitually used as, that of the firm, although not strictly accurate, it binds the other partners³.

1 *Re Barnard, Edwards v Barnard* (1886) 32 ChD 447, CA. Nor is the partner severally liable if the bill is accepted by the partner 'for the partnership and self': *Malcomson v Malcomson* (1878) 1 LR 1r 228. See also the Bills of Exchange Act 1882 s 23(2). As to bills of exchange and other negotiable instruments see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq.

2 *Re Adanson Fibre Co, Miles' Claim* (1874) 9 Ch App 635. As to the effect of a cheque given in the firm's name and signed by only one partner where the firm's bank mandate required both partners to sign all such cheques see PARA 50.

3 *Williamson v Johnson* (1823) 1 B & C 146 (bill given in the name of 'H & F' instead of 'H & Co'); *South Carolina Bank v Case* (1828) 8 B & C 427, explained in *Nicholson v Ricketts* (1860) 2 E & E 497, and in *Re Adanson Fibre Co, Miles' Claim* (1874) 9 Ch App 635; *Faith v Richmond* (1840) 11 Ad & El 339, where those members of the firm who used the name were held liable but not the firm itself.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/D. ACTS DONE IN NAME OF INDIVIDUAL PARTNER/61. Money used by the firm.

61. Money used by the firm.

The mere fact that money borrowed by a partner in his own name on security belonging to him personally has been used for the purposes of his firm with the knowledge of his partners does not render them liable¹. There is no implication of law, from the mere existence of a trading partnership, that a partner has authority to bind the firm by opening a bank account on its behalf in his own name².

1 *Bevan v Lewis* (1827) 1 Sim 376. He may, however, be entitled to be indemnified by them: *Browne v Gibbins* (1725) 5 Bro Parl Cas 491, HL; *Re Oundle Union Brewery Co, Croxton's Case* (1852) 5 De G & Sm 432.

2 *Alliance Bank Ltd v Kearsley* (1871) LR 6 CP 433. As to a partner's implied authority to borrow on behalf of the firm see PARA 51 et seq. As to the meaning of 'trading partnership' see PARA 6 note 1.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/D. ACTS DONE IN NAME OF INDIVIDUAL PARTNER/62. Promises to pay the firm's debt.

62. Promises to pay the firm's debt.

If a partner promises in his own name to pay a debt of his firm, he alone is liable on the promise, and he cannot raise the defence that the debt was a joint liability¹.

¹ *Murray v Somerville* (1809) 2 Camp 98n.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/D. ACTS DONE IN NAME OF INDIVIDUAL PARTNER/63. Admissions and representations.

63. Admissions and representations.

An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business¹, is evidence against the firm².

1 As to what may be held to be in the ordinary course of business see PARAS 45, 75.

2 Partnership Act 1890 s 15; and see **CIVIL PROCEDURE** vol 11 (2009) PARA 819.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(i) Contractual Liability/E. RATIFICATION, REPUDIATION AND ACQUIESCENCE/64. Ratification, repudiation and acquiescence in unauthorised acts by co-partners.

E. RATIFICATION, REPUDIATION AND ACQUIESCENCE

64. Ratification, repudiation and acquiescence in unauthorised acts by co-partners.

Transactions which would prima facie be within the implied authority of a partner do not bind his firm if he has, in fact, to the knowledge of the person dealing with him, no authority to carry out these transactions¹.

When a partner exceeds his authority, the other partners may, however, adopt the transaction, and are then bound by it²; and they may be bound if they have notice of the transaction and raise no objection. Notice to that partner is not notice to the others³; nor is notice to a clerk employed by a partnership of unauthorised transactions by a partner constructive notice to an individual partner who has no actual knowledge of those transactions⁴.

If a partner's unauthorised acts become known to his co-partner, who merely complains of them without taking any further step, and allows a record of them to remain in the firm books, the co-partner may be bound by the doctrine of acquiescence⁵.

A firm may be permitted to ratify a partner's unauthorised acts only if it also ratifies other acts connected with them⁶.

1 See the Partnership Act 1890 ss 5, 8; *Lord Galway v Matthew and Smithson* (1808) 1 Camp 403; *Heilbut v Nevill* (1869) LR 4 CP 354 (affd (1870) LR 5 CP 478). The holder of a bill indorsed or accepted by one partner cannot sue the other partners if he knew, when he took the bill, that that partner had no authority to indorse or accept it: *Arden v Sharpe and Gilson* (1797) 2 Esp 524; *Lord Galway v Matthew and Smithson* above; *Heilbut v Nevill* above; *Hogarth v Latham & Co* (1878) 3 QBD 643, CA. Cf *Greenslade v Dower* (1828) 7 B & C 635. Where the name of the firm is that of one of the partners who does not carry on a separate business, a bill drawn or accepted in such name is presumed to be a partnership bill, unless it is proved to have been given as the bill of the individual partner and not of the firm: *Yorkshire Banking Co v Beatson (1)*, *Leeds and County Banking Co v Beatson* (1879) 4 CPD 204; affd on different grounds (1880) 5 CPD 109, CA. Cf *Re Blackburn, ex p Bolitho* (1817) Buck 100; *Lloyd v Ashby* (1831) 2 B & Ad 23; but see *Wintle v Crowther* (1831) 1 Cr & J 316.

2 *Willis v Dyson* (1816) 1 Stark 164. As to the conditions which must exist to constitute a binding adoption of acts a priori unauthorised see *Marsh v Joseph* [1897] 1 Ch 213 at 246, CA, per Lord Russell of Killowen CJ; and see **AGENCY** vol 1 (2008) PARAS 66-67. In case of the repudiation of a contract entered into by one partner within the scope of his authority, the partnership is liable for everything done under the contract before receipt of notice of repudiation by the party contracting with the partner, or subsequently in respect of liabilities already incurred: *Smith v Ure* (1833) 2 Knapp 188, PC.

3 *Williamson v Barbour* (1877) 9 ChD 529 at 536.

4 *Lacey v Hill, Leney v Hill* (1876) 4 ChD 537 at 549, CA; affd sub nom *Read v Bailey* (1877) 3 App Cas 94, HL.

5 *Cragg v Ford* (1842) 1 Y & C Ch Cas 280 at 285. As to acquiescence see **EQUITY** vol 16(2) (Reissue) PARA 909 et seq.

6 The unauthorised obtaining of bank drafts by a partner could not be ratified unless the subsequent misdealing with them was also ratified: *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1, [1960] 3 All ER 482, PC; and see *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(ii) Non-contractual Liability/65. Civil and criminal liability of the firm.

(ii) Non-contractual Liability

65. Civil and criminal liability of the firm.

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm¹, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable to the same extent as the partner so acting or omitting to act². This provision of the Partnership Act 1890³ is not confined to torts⁴ or other common law wrongs; it applies whenever injury is caused to a non-partner, or any penalty is incurred by any wrongful act or omission of any partner⁵. The section is concerned only with fault-based liability⁶. It therefore applies to the misapplication of money (despite this being specifically covered by another provision of the Act)⁷ and extends also to crimes⁸.

Every partner is liable jointly with his co-partners and also severally for everything which the firm becomes liable in this way while he is a partner⁹. The firm is therefore liable for torts¹⁰, equitable wrongs¹¹ and crimes¹² committed by partners in the ordinary course of the partnership business.

1 As to what may be held to be in the ordinary course of business see PARAS 45, 75.

2 See the Partnership Act 1890 s 10; and PARA 75.

3 I.e. the Partnership Act 1890 s 10: see the text and notes 1-3.

4 See PARAS 66-70. As to liability for torts generally see **TORT** vol 97 (2010) PARA 401 et seq.

5 *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 at [103] per Lord Millett.

6 *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 at [103] per Lord Millett.

7 I.e. the Partnership Act 1890 s 11 which deals specifically with the misapplication of money or property received: see PARA 72. See also s 13 (improper employment of trust property); and PARA 73. The following distinction was drawn between these provisions by Lord Millett in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 at [110], [111]: 'Sections 11 and 13 are not concerned with wrongdoing or with vicarious liability but with the original liability of the firm to account for receipts . . . The innocent partners are not vicariously liable for the misappropriation, which will have occurred outside the ordinary course of the firm's business. But they are liable to restore the money if the requirements of the general law of knowing receipt are satisfied. . . . The critical distinction between s 10 on the one hand and ss 11 and 13 on the other is not between liability at common law and liability in equity, but between vicarious liability for wrongdoing and original liability for receipts. The firm (s 10) and its innocent partners (s 9) are vicariously liable for a partner's conduct provided that three conditions are satisfied: (1) his conduct must be wrongful, that is to say it must give rise to fault-based liability and not, for example, merely receipt-based liability in unjust enrichment; (2) it must cause damage to the claimant; and (3) it must be carried out in the ordinary course of the firm's business'.

8 See PARA 71; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

9 See the Partnership Act 1890 s 12; and PARA 75.

10 See PARAS 66 et seq, 75.

11 As to equitable wrongs see PARA 73.

12 As to criminal liability see PARA 71.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(ii) Non-contractual Liability/66. Liability for negligence.

66. Liability for negligence.

Partners are jointly and severally liable¹ for the negligence² of one partner in the ordinary course of the partnership business³.

1 As to joint and several liability for torts under the Partnership Act 1890 s 10 see PARA 75.

2 *Ashworth v Stanwix* (1861) 3 E & E 701 (injury to employee caused by partner's negligence); *Mellors v Shaw and Unwin* (1861) 1 B & S 437; *Kirkintilloch Equitable Co-operative Society Ltd v Livingstone* 1972 SLT 154 (negligence of a single partner in his work as an auditor). As to the principles of liability for negligence generally see **NEGLIGENCE**.

3 As to what may be held to be in the ordinary course of business see PARAS 45, 75.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(ii) Non-contractual Liability/67. Liability for misrepresentation.

67. Liability for misrepresentation.

Innocent partners are liable for the misrepresentations of one of their partners in matters connected with the ordinary business of the firm¹.

¹ *Rapp v Latham* (1819) 2 B & Ald 795. As to joint and several liability for torts under the Partnership Act 1890 s 10 see PARA 75. As to misrepresentation generally see **MISREPRESENTATION AND FRAUD**. As to what may be held to be in the ordinary course of business see PARAS 45, 75.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(ii) Non-contractual Liability/68. Liability for trespass.

68. Liability for trespass.

One partner is not liable for the trespass of another unless committed with his knowledge or ratified by him¹.

¹ *Petrie v Lamont* (1841) Car & M 93; and see *Thomas v Atherton* (1878) 10 ChD 185 at 196, CA. As to trespass generally see **TORT** vol 97 (2010) PARA 562 et seq. As to joint and several liability for torts under the Partnership Act 1890 s 10 see PARA 75.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(ii) Non-contractual Liability/69. Liability for malicious prosecution.

69. Liability for malicious prosecution.

If a partner maliciously prosecutes a person for stealing the partnership property, it would seem that neither the firm nor the other partners are liable to a claim for malicious prosecution and wrongful imprisonment merely because the property was partnership property¹.

¹ *Arbuckle v Taylor* (1815) 3 Dow 160, HL. As to malicious prosecution generally see **TORT** vol 97 (2010) PARA 627 et seq. As to joint and several liability for torts under the Partnership Act 1890 s 10 see PARA 75.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(ii) Non-contractual Liability/70. Liability for defamation.

70. Liability for defamation.

In a defamation claim against a firm where all the partners had published the libel but each could claim qualified privilege, only the partner against whom malice was shown was held liable¹.

¹ *Meekins v Henson* [1964] 1 QB 472, [1962] 1 All ER 899. As to defamation generally see **LIBEL AND SLANDER**. As to joint and several liability for torts under the Partnership Act 1890 s 10 see **PARA 75**.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(ii) Non-contractual Liability/71. Criminal liability.

71. Criminal liability.

The provision of the Partnership Act 1890 which renders the firm liable to the same extent as the wrong-doing partner where he acts in the ordinary course of the business of the firm, or with the authority of his co-partners¹ applies to crimes² as well as torts³, and the other partners themselves may therefore face prosecution⁴.

A person may be criminally liable if false descriptions are made recklessly by his partner and he does not actively disassociate himself from them⁵.

A firm may be liable for the fraud of a partner in certain circumstances⁶. A firm cannot acquire property in goods obtained by the fraud of one partner to which the rest are not privy if they are obtained by the partner with a preconceived design of raising money upon them and then absconding without payment⁷.

1 See the Partnership Act 1890 s 10: see PARA 75.

2 See the references in the Partnership Act 1890 s 10 to 'any wrongful act or omission' and to 'any penalty incurred': see PARA 75.

3 See PARAS 66 et seq, 75.

4 See *Clode v Barnes* [1974] 1 All ER 1166, [1974] 1 WLR 544 (partner convicted of offence under the Trade Descriptions Act 1968 as he was deemed to be a joint supplier of car to which the false description had been applied by the other partner). As to lack of separate legal personality for partnerships see PARA 2.

5 *Parsons v Barnes* [1973] Crim LR 537, DC. As to a partner's liability for his co-partner's driving offence see *Bennett v Richardson* [1980] RTR 358, DC.

6 *Cleather v Twisden* (1884) 28 ChD 340, CA (other partners not liable for fraud); *Hughes v Twisden* (1886) 55 LJ Ch 481 (solicitors); and see *National Commercial Banking Corp'n of Australia v Batty* (1986) 65 ALR 385, Aust HC (accountants); *United Bank of Kuwait v Hammoud, City Trust Ltd v Levy* [1988] 3 All ER 418, [1988] 1 WLR 1051, CA (solicitor gave undertaking to firm's clients' prospective lenders knowing that the firm did not have sufficient funds to justify the undertaking; firm held liable). See also *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 (co-partners held liable for A's dishonest assistance in a fraudulent scheme in drafting bogus agreements because these acts were so closely connected with the acts A was authorised to do that they might fairly and properly be regarded as done by him while acting in the ordinary course of the firms' business); and PARA 75.

7 *Kilby v Wilson* (1825) Ry & M 178 at 181 per Abbott CJ.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(ii) Non-contractual Liability/72. Misapplication of money.

72. Misapplication of money.

Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it¹, or where a firm in the course of its business² receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm³, the firm is liable to make good the loss⁴. Every partner is liable jointly with his co-partners and also severally for everything for which the firm becomes liable, while he is a partner, under this provision⁵. Liability may similarly be incurred under the provision which renders the firm liable to the same extent as the wrong-doing partner where, in acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred⁶.

1 Partnership Act 1890 s 11(a).

2 As to what may be held to be in the ordinary course of business see PARAS 45, 75.

3 Partnership Act 1890 s 11(b).

4 Partnership Act 1890 s 11; *Marquise de Ribeyre v Barclay* (1857) 23 Beav 107; *Re Collie, ex p Adamson* (1878) 8 ChD 807, CA. The firm will not be liable where the money misapplied was not received by it in the course of its business, but as a result of a contract entered into with the defaulting partner individually and not as a member of the firm: *New Mining and Exploring Syndicate Ltd v Chalmers and Hunter* 1912 SC 126. The partners will be jointly and severally liable for misappropriation of money where an undertaking, within the scope of the partnership business, had been given by one partner to apply money, paid to him by a client of the firm, for a specific purpose: *Atkinson v Mackreth* (1866) LR 2 Eq 570.

'[The Partnership Act 1890] s 11 and s 13 are both concerned with third party money received by the firm. Section 11 deals with money which is properly received by the firm (or by one of the partners acting within the scope of his apparent authority) for and on behalf of the third party but which is subsequently misapplied. The firm is liable to make good the loss. Section 13 is concerned with money held by a partner in some other capacity, such as trustee, which is misapplied by him and then improperly and in breach of trust employed by him in the partnership business. His partners can be made liable only in accordance with the ordinary principles of knowing receipt': *Bass Brewers Ltd v Appleby* [1997] 2 BCLC 700 at 711, CA, per Millett LJ. As to the Partnership Act 1890 s 13 see PARA 73.

5 Partnership Act 1890 s 12. The provision referred to is s 11: see the text and notes 1-4.

6 See the Partnership Act 1890 s 10; and PARA 75.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(ii) Non-contractual Liability/73. Breach of trust.

73. Breach of trust.

If a partner who is acting individually as a trustee improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the beneficiaries¹. However, this does not affect any liability incurred by any partner by reason of his having notice of a breach of trust². Nor does it prevent trust money from being followed and recovered from the firm if still in its possession or under its control³. Where the other partners are implicated in the breach of trust, the liability arising out of it is joint and several⁴.

Where a trustee improperly lends trust money to a firm, and the partners know or ought to be treated as knowing the facts, they themselves are implicated in the breach of trust, and are jointly and severally liable for it⁵.

1 Partnership Act 1890 s 13. See *Coomer v Bromley* (1852) 5 De G & Sm 532.

As to the distinction between the spheres of operation of the Partnership Act 1890 s 11 and s 13 see *Bass Brewers Ltd v Appleby* [1997] 2 BCLC 700 at 711, CA, per Millett LJ; and PARA 72 note 4.

Whilst the Partnership Act 1890 s 10 (liability of the firm for wrongs committed in the course of business: see PARA 75) can apply to instances of knowing assistance (see *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366; *Liggins v Lumsden* [1999-2001] MLRep 601), the Partnership Act 1890 s 13 has been distinguished from s 10 on the basis that breaches of trust do not generally occur in the ordinary course of the business: see *Walker v Stones* [2001] QB 902, [2000] 4 All ER 412, CA; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 at [134] per Lord Millett.

2 Partnership Act 1890 s 13 proviso (1); *Re Moxon, ex p Heaton* (1819) Buck 386; *Re Harford, ex p Poulson* (1844) De G 79. See also *Twyford v Trial* (1834) 7 Sim 92, where in special circumstances incoming partners were held not liable although they knew of the breach of trust.

3 Partnership Act 1890 s 13 proviso (2).

4 *Re Acraman, ex p Woodin* (1843) 3 Mont D & De G 399; *Blyth v Fladgate, Morgan v Blyth, Smith v Blyth* [1891] 1 Ch 337 at 353. As to the joint and several liability of partners see PARA 75.

5 *Re Acraman, ex p Woodin* (1843) 3 Mont D & De G 399. As to the circumstances in which liability as constructive trustee may be imposed upon a person see **EQUITY** vol 16(2) (Reissue) PARA 852; **TRUSTS** vol 48 (2007 Reissue) PARA 625. It was held in *Re Biddulph, ex p Burton* (1843) 3 Mont D & De G 364 that, where one partner in a firm of bankers who was not a trustee invests trust money in improper securities with the knowledge of his partners, they are jointly liable as bankers but not jointly and severally liable as trustees. In *Re Kent County Gas Light & Coke Co Ltd* [1913] 1 Ch 92 it was held that, in order to give a creditor a right of double proof, there must be distinct contracts made with the firm and the partners.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(iii) Nature of Liability to Third Persons/74. Joint liability on contracts.

(iii) Nature of Liability to Third Persons

74. Joint liability on contracts.

A partnership is not a 'person' or legal entity in its own right, but it may sue and be sued in the firm name¹. A reference in a contract to 'the firm' must be taken to mean the partners themselves². Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner³. A promissory note signed by one partner for himself and his named partners may create only a joint liability even if it begins 'I promise to pay'⁴; and a promissory note given by a firm (and a stranger as surety) has been held only to impose a joint liability on the members of the firm⁵. An undertaking to pay the debts of a third person signed in the firm name and by each partner in his own name, so as to amount to a joint and several guarantee, creates a joint and several liability⁶.

1 See PARA 2.

2 See *Sheppard & Cooper Ltd v TSB Bank plc* [1997] 2 BCLC 222, [1996] 12 LS Gaz R 30, CA; *Kelly v Northern Ireland Housing Executive*, *Loughran v Northern Ireland Housing Executive* [1999] 1 AC 428, [1998] 3 WLR 735, HL; *Dave v Robinska* [2003] ICR 1248, [2003] NLJR 921, [2003] All ER (D) 35 (Jun), EAT; and PARA 2.

3 Partnership Act 1890 s 9. This provision is declaratory of the former law. It is founded on the principle that every partner is an agent of the firm and his other partners for the purpose of the business of the partnership: see s 5; and PARA 45. As to the effect of a joint covenant entered into by partners see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 261. See also the Civil Liability (Contribution) Act 1978; and PARA 86. As to the liability of the separate estate of a deceased partner see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 781. As to the determination of a partnership contract on the death of a partner see PARA 58 text and note 5.

4 *Re Clarke, ex p Buckley* (1845) 14 M & W 469.

5 *Re Manley, ex p Wilson* (1842) 3 Mont D & De G 57.

6 *Re Smith, Fleming & Co, ex p Harding* (1879) 12 ChD 557, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(iii) Nature of Liability to Third Persons/75. Joint and several liability for wrongs.

75. Joint and several liability for wrongs.

Where, by any wrongful act¹ or omission of any partner acting in the ordinary course of the business of the firm², or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable to the same extent as the partner so acting or omitting to act³. Every partner is liable jointly with his co-partners and also severally for everything for which the firm becomes liable, while he is a partner, under this provision⁴. All the members of a firm are liable for the wrongful acts of a partner which are committed in the ordinary course of business as carried on by that particular firm (even if the transaction in question is not within the usual scope of similar businesses⁵) or to secure an object which would be within the ordinary scope of the partnership business, if attained by legitimate means⁶.

1 See note 2.

2 One partner's wrongful act, although not authorised by his co-partners, could nevertheless be said to have been done 'in the ordinary course of the business of the firm' if it could fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business; and whether it could be so regarded was for the court to evaluate as a question of law: *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366. See also *Flynn v Robin Thompson & Partners (a firm)* (2000) Times, 14 March, CA (assault alleged to have been carried out in court precincts by solicitor could not be said to amount to a wrongful act of a partner acting in the course of the business of the firm); *JJ Coughlan Ltd v Ruparelia* [2003] EWCA Civ 1057, [2003] All ER (D) 344 (Jul) (fraudulent investment scheme was so far removed from what a solicitor partner had been authorised to do, his actions could not be regarded as done in the course of the firm's business); cf *McHugh v Kerr* [2003] EWHC 2985 (Ch), [2003] All ER (D) 156 (Dec) (buying and selling of shares is part of the ordinary course of business for a firm of accountants; partnership held liable for partner's fraudulent dealings). As to what may be held to be in the ordinary course of business see also PARA 45.

3 Partnership Act 1890 s 10; and see *Meekins v Henson* [1964] 1 QB 472, [1962] 1 All ER 899. This provision equates the position of a partner with that of an employer or a principal: *Meekins v Henson* at 477 and at 902 per Winn J. Where a partner acts fraudulently and without the scope of his implied authority, his firm is not liable therefor: *National Commercial Banking Corp of Australia Ltd v Batty* (1986) 65 ALR 385, Aust HC; but see *United Bank of Kuwait v Hammoud, City Trust Ltd v Levy* [1988] 3 All ER 418, [1988] 1 WLR 1051, CA; and PARA 47. As to the power of a partner to bind the firm see the Partnership Act 1890 s 5; and PARA 45.

4 Partnership Act 1890 s 12. The provision referred to is s 10: see the text and notes 1-3.

5 *Rhodes v Moules* [1895] 1 Ch 236, CA.

6 *Hamlyn v Houston & Co* [1903] 1 KB 81 at 85, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(iv) Duration of Liability/76. Commencement of liability.

(iv) Duration of Liability

76. Commencement of liability.

A person who is admitted as a partner into an existing firm does not thereby become liable to the firm's creditors for anything done before he became a partner¹, unless there is some agreement to the contrary².

Where prospective partners have agreed to enter into partnership with effect from a certain date on terms to be embodied in a formal partnership agreement to be executed on that date, a partner is nevertheless liable for the debts incurred by his firm from the date on which the partnership commences trading, even if the partnership deed is executed at a later date³, notwithstanding an arrangement to the contrary between himself and his partners⁴.

An agreement for a partnership in certain events does not render the parties liable for the acts or defaults of each other as partners until the events happen, unless there has been 'holding out'⁵; and abortive negotiations for a partnership on the terms of a certain draft agreement are not sufficient to render the parties liable as partners⁶.

1 Partnership Act 1890 s 17(1); *Shirreff v Wilks* (1800) 1 East 48; *Lucas v Beach* (1840) 1 Man & G 417; *Beale v Moults* (1847) 10 QB 976; *Newton v Belcher* (1848) 12 QB 921; *Dyke v Brewer* (1849) 2 Car & Kir 828; and see *Craufurd v Cocks* (1851) 6 Exch 287. Knowledge by a creditor of the old firm that the new partner had joined the firm is not a necessary ingredient in determining his liability to that creditor: *Scott v Beale and Bishop* (1859) 6 Jur NS 559. Promoters of a bill for a railway are liable from the date of association and not merely from the passing of the bill (*Holmes v Higgins* (1822) 1 B & C 74); but it may be questioned whether *Holmes v Higgins* and *Lucas v Beach* above were really cases of partnership. As to the nature of the relationship between persons who are intending to enter into partnership together, where no partnership yet exists, and as to their duties to each other, see PARA 1.

2 Thus the fact that a purchaser of goods later agrees to share his profits with another does not permit the vendor to sue that other for the price: *Young v Hunter* (1812) 4 Taunt 582. Cf *Mawman v Gillett* (1809) 2 Taunt 325n. Even if a new partner agrees with the firm that he will enjoy back-dated rights as a partner, his liability for goods supplied to the firm is not back-dated: *Wilsford v Wood* (1794) 1 Esp 181. As to the joint liability of various individuals who contribute to one cargo of goods see *Saville v Robertson* (1792) 4 Term Rep 720; cf *Gouthwaite v Duckworth* (1810) 12 East 421, followed and applied in *Karmali Abdulla Allarakhia v Vora Karimji Jivanji* (1914) LR 42 Ind App 48, PC, where Lord Dunedin distinguished *Saville v Robertson* (1792) 4 Term Rep 720. See also PARA 12; cf *Barton v Hanson* (1809) 2 Taunt 49; *Young v Hunter* (1812) 4 Taunt 582.

Novation operates so that a retiring partner may be discharged from existing liabilities by an express or implied agreement to the effect between himself, the members of the firm as newly constituted and the creditor: see the Partnership Act 1890 s 17(3); and PARA 77. An incoming partner may accept pre-existing liabilities of the firm in the same way, but it will be easier to infer novation with respect to future liabilities on a continuing contract than it will be to infer novation as regards existing liabilities incurred prior to the change in the partnership: see *Re Burton Marsden Douglas (a firm)*; *Marsden v Guide Dogs for the Blind Association* [2004] EWHC 593 (Ch), [2004] 3 All ER 222 at [28]-[33] per Lloyd J. As to the effect of novation upon contractual liability see **CONTRACT** vol 9(1) (Reissue) PARA 1036 et seq.

3 *Battley v Lewis* (1840) 1 Man & G 155 (where the partners began trading on the agreed date); cf *Vere v Ashby* (1829) 10 B & C 288.

4 *Wilson v Lewis* (1840) 2 Man & G 197. If, however, the agreement is executed on the correct date but the business is not in fact commenced for some time thereafter, there can be no implied agency nor, therefore, liability in the intervening period. Equally, if the facts are equivocal or there is nothing to suggest that the partnership commenced on a date earlier or later than that on which the partnership agreement was executed, each partner's agency will be treated as commencing on the date on which the agreement was so executed,

and evidence of an oral agreement that it was to commence on a future (ie different) date is inadmissible: *Williams v Jones* (1826) 5 B & C 108. As to the creation of partnerships by written agreement see PARA 38; and as to proving the existence of a partnership by oral evidence see PARA 39.

5 *Dickinson v Valpy* (1829) 10 B & C 128 at 141, 142 per Parke J. Quaere whether such liability by 'holding out' can exist where in fact no partnership exists: see *Hudgell Yeates & Co v Watson* [1978] QB 451 at 467, [1978] 2 All ER 363 at 372, 373, CA, per Waller LJ. As to 'holding out' as a partner see PARA 24 et seq. A person with an option to become a partner within a certain time is not liable for goods supplied to the firm during that time before he exercises the option (*Gabriel v Evill* (1842) 9 M & W 297), nor in respect of bills drawn during that time (*Gabriel v Evill* and *Dickinson v Valpy* above).

6 *Ex p Peele* (1802) 6 Ves 602; *Re Vanderplank, ex p Turquand* (1841) 2 Mont D & De G 339.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(iv) Duration of Liability/77. Liability for debts incurred before a partner's retirement.

77. Liability for debts incurred before a partner's retirement.

A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement¹; but he may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted². The same principles apply when the retiring partner has been only a sleeping partner³. Legal costs relating to a claim which is pending when the partner retires are treated as a liability incurred when the solicitor was retained⁴.

No agreement between partners with regard to the incidence of a partnership liability can in itself affect the rights of creditors⁵. Therefore, an agreement by continuing partners to indemnify a retiring partner against the partnership debts⁶ does not extinguish the joint liability of the partners to creditors, although, as between the partners, the retiring partner is in the position of a surety⁷.

1 Partnership Act 1890 s 17(2). See *Roughead v White* 1913 SC 162 (retired partner unsuccessfully claimed to be relieved of his liabilities in respect of bonds entered into during the partnership). In *Welsh v Knarston* 1972 SLT 96 a firm of solicitors negligently failed to begin proceedings before the relevant limitation period expired, and it was held that a partner who had retired after the firm was instructed but before the expiration of the limitation period was jointly liable. The meaning of 'retire' was considered in *Earle v Cow* (1920) 36 TLR 713, where Sargant J held that partners retired when the firm was turned into a limited company. See also *Friends Provident Life and Pensions Ltd v Evans* [2006] EWCA Civ 581, [2006] All ER (D) 388 (Mar).

2 Partnership Act 1890 s 17(3). See *Daniel v Cross* (1796) 3 Ves 277; *Newmarch v Clay* (1811) 14 East 239; *Hobson v Cowley* (1858) 27 LJ Ex 205; *Hooper v Keay* (1875) 1 QBD 178; *Bilborough v Holmes* (1876) 5 ChD 255; *Cripps v Tappin & Co* (1882) Cab & El 13; *Re Head, Head v Head* [1893] 3 Ch 426. Mere knowledge by the creditor of the change of firm is not sufficient, however, to discharge the retiring partner: *Blew v Wyatt* (1832) 5 C & P 397; and see *Thompson v Percival* (1834) 5 B & Ad 925; *Re Family Endowment Society* (1870) 5 Ch App 118. As to the circumstances which determine whether or not a retiring partner is discharged from liability see *Heath v Percival* (1720) 1 P Wms 682; *Dickenson v Lockyer* (1798) 4 Ves 36; *Bedford v Deakin* (1818) 2 B & Ald 210; *Re Robertson, ex p Gould* (1834) 4 Deac & Ch 547; *Kirwan v Kirwan* (1834) 2 Cr & M 617; *Thompson v Percival* above; *Hart v Alexander* (1837) 2 M & W 484; *Benson v Hadfield* (1844) 4 Hare 32; *Cummins v Cummins* (1845) 3 Jo & Lat 64 at 87; *Harris v Farwell* (1851) 15 Beav 31; *Spenceley v Greenwood* (1858) 1 F & F 297; *Brinsmead & Son v Locke & Son* (1889) 5 TLR 542; cf *Re Worters, ex p Oakes* (1841) 2 Mont D & De G 234; *Re Smith, Knight & Co, ex p Gibson* (1869) 4 Ch App 662. It is doubtful whether *Lodge v Dicus* (1820) 3 B & Ald 611 and *David v Ellice* (1826) 5 B & C 196 could now be supported. As to implied novation for incoming partners see PARA 76 note 2.

3 *Court v Berlin* [1897] 2 QB 396, CA, followed in *Welsh v Knarston* 1972 SLT 96. Executors of a deceased partner who are entitled to a share of profits but do not take any part in conducting the business are not liable as partners: see *Holme v Hammond* (1872) LR 7 Exch 218. See also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 787. As to the meaning of 'sleeping partner' see PARA 4.

4 *Court v Berlin* [1897] 2 QB 396, CA. It is questionable, however, whether the retiring partner might escape liability for the costs incurred, after he retires, by withdrawing his retainer or by giving notice of dissolution to the solicitor: *Court v Berlin* at 399 per Lord Esher MR and at 401 per A L Smith LJ. See also on this point *Welsh v Knarston* 1972 SLT 96.

5 *Gough v Davies and Gibbons* (1817) 4 Price 200.

6 Even if not expressly agreed, such indemnity will, however, normally be implied when a partner retires: *Gray v Smith* (1889) 43 ChD 208, CA; and see PARA 200.

7 *Rodgers v Maw* (1846) 4 Dow & L 66; and see *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL (distinguished in *Swire v Redman* (1876) 1 QBD 536 and in *Oakford v European and American Steam Shipping Co Ltd* (1863) 1 Hem & M 182; followed in *Rouse v Bradford Banking Co Ltd* [1894] AC 586, HL); *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639 (where it was held (following *Rouse v Bradford Banking Co Ltd* above) that a retiring partner who was liable only as a surety on a bill of exchange under an agreement known to the creditor was released owing to time being given to the principal debtors). Cf *Re Douglas, ex p The Executors of James Douglas* [1930] 1 Ch 342. As to sureties, guarantee and indemnity see generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1013 et seq. An exceptional case in relation to the continuation of a firm's guarantee (and which may have ramifications in relation to a retiring partner's continuing liability under a guarantee given by his firm whilst he was a partner) is *Universal Co v Yip* [1986] CA Transcript 581, where it was held that a guarantee continued to bind the guarantor for the benefit of a firm, notwithstanding that the firm had subsequently been taken over by a limited company; and see PARA 48. The rule in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 572 also has clear ramifications for a retired partner's continuing liability. However, there has been a trend away from applying the rule where to do so would be impractical or would result in an injustice: see *Barlow Clowes International Ltd (in liquidation) v Vaughan* [1992] 4 All ER 22, CA (company case); and **EQUITY** vol 16(2) (Reissue) PARA 864. Where there is an express covenant to indemnify, the retiring partner or the personal representative of a deceased partner may not insist upon the immediate discharge by the continuing partners of debts for which no demand for payment has been made. The right to enforce the covenant arises when the demand has been made, and not before: *Bradford v Gammon* [1925] Ch 132 at 139.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(1) POWER OF ONE PARTNER TO BIND THE FIRM AND LIABILITY OF PARTNERS TO THIRD PERSONS/(iv) Duration of Liability/78. Liability for debts incurred after a partner's retirement.

78. Liability for debts incurred after a partner's retirement.

A retiring partner may be liable for subsequent debts if no proper notice of dissolution has been given to the creditors¹, or even if such notice has been given but he has left his name in the firm style²; but the estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to a creditor dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy or retirement respectively³. Liability for costs, incurred after the date of retirement, of an action begun before and pending at such date is not for this purpose a subsequent debt⁴.

1 See the Partnership Act 1890 s 36(1), (2); and PARAS 195-196; *Parkin v Carruthers* (1800) 3 Esp 248; *Osborne v Harper* (1804) 5 East 225; *Farrar v Deffinne* (1843) 1 Car & Kir 580; *Slack v Parker* (1886) 54 LT 212. As to estoppel by representation of retired partners see PARA 27. As to notices of dissolution see PARAS 194-196.

2 *Williams v Keats* (1817) 2 Stark 290. The rule as to holding out (see PARA 24 et seq) does not apply so as to impose liability on the personal representatives of a deceased partner, where the business is continued by the surviving partners: see PARA 27.

3 Partnership Act 1890 s 36(3); and see *Tower Cabinet Co Ltd v Ingram* [1949] 2 KB 397, [1949] 1 All ER 1033, DC (claimant company did not know the defendant as a partner before the dissolution of the partnership and, therefore, he was not liable for debts contracted with the company after that date). A dormant partner may retire from a firm without giving notice to the world: *Heath v Sansom* (1832) 4 B & Ad 172 at 177 per Patteson J. See also *Evans v Drummond* (1801) 4 Esp 89; *Robinson v Wilkinson* (1817) 3 Price 538; *Crawshay v Maule* (1818) 1 Swan 495; *Dolman v Orchard* (1825) 2 C & P 104; *Western Bank of Scotland v Needell* (1859) 1 F & F 461; *Powles v Page* (1846) 3 CB 16. As to a firm's obligation to state each existing partner's name on all business letters, written orders, invoices, receipts and written demands for payment of business debts see PARAS 7-8.

4 *Court v Berlin* [1897] 2 QB 396, CA; and see PARA 77 note 4.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(i) Claims by Partners and Firms/79. Firm's capacity to sue.

(2) LEGAL PROCEEDINGS

(i) Claims by Partners and Firms

79. Firm's capacity to sue.

Although a firm is not a legal entity¹, all the members of a firm may sue on a contract made in the firm name², or on a contract made by one of them as agent for the firm³, and, when there is joint damage, all may bring a claim in tort, founded upon such damage⁴. Alternatively, and if the contract upon which the claim is founded was made by only one partner for the benefit of the firm, that partner may sue in his own name without joining his partners as parties⁵.

As a matter of procedure⁶, partners carrying on business within the jurisdiction must sue or be sued⁷ in the name of the firm of which they were partners at the time when the cause of action accrued, unless it is inappropriate to do so⁸.

¹ See PARAS 1-2.

² As to the firm name see PARA 7.

³ *Skinner v Stocks* (1821) 4 B & Ald 437; *Cothay v Fennell* (1830) 10 B & C 671; *Alexander v Barker* (1831) 2 Cr & J 133. A continuing partner may be entitled to sue alone on a contract made with him and a retired partner jointly (*Atkinson v Laing* (1822) Dow & Ry NP 16), or made on his behalf, even after dissolution, by a retired partner (*Cox v Hubbard* (1847) 4 CB 317). An active partner might sue without joining his sleeping partner as a claimant (*Leveck v Shaftoe* (1796) 2 Esp 468), but an ostensible partner whose name appeared in the firm was held to be a necessary claimant, even though he was in fact only in receipt of a salary (*Guidon v Robson* (1809) 2 Camp 302). As to a single partner's power to sue alone upon a contract made in his own name but for the benefit of the continuing (not dissolved) firm see note 5. As to a partner's power to prosecute proceedings in relation to matters regarding his firm's taxation see *Customs and Excise Comrs v Evans (t/a The Grape Escape Wine Bar)* [1982] STC 342 obiter per Glidewell J; but see *Re Sutherland & Partners' Appeal* [1994] STC 387, CA; and PARA 47.

⁴ *Longman v Pole* (1828) Mood & M 223; and see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 28. As to injunctions by firms against third persons see PARA 170.

⁵ See *Roberts v J W Ward and Son (a firm)* [1985] CA Transcript 71 (where the fact that a partner was seeking to recover an unliquidated sum in respect of losses which he and his co-partners had suffered, so that, to some extent, he was seeking to recover damages for loss that he had not suffered himself, was held to be no bar to his recovering for the full amount of such loss). See also *Hudson v Robinson* (1816) 4 M & S 475; *Driver v Burton* (1852) 17 QB 989. As to a partner's right to sue in his own name alone in relation to the firm's tax liabilities see note 3; and PARA 47 note 1.

⁶ See CPR 7.2A; *Practice Direction--How to Start Proceedings* PD 7 paras 5A-5C; PARA 80 et seq; and **CIVIL PROCEDURE** vol 11 (2009) PARA 224. Cases decided under RSC Ord 81 (now repealed), which governed actions by and against partnerships before the advent of CPR 7.2A, are included for illustration. See eg *Roberts v J W Ward and Son (a firm)* [1985] CA Transcript 71; *Meyer & Co v Faber (No 2)* [1923] 2 Ch 421 at 435, 439, CA; *Mephistopheles Debt Collection Service (a firm) v Lotay* [1994] 26 LS Gaz R 36, CA. As to High Court and county court procedure generally see **CIVIL PROCEDURE**. As to the substitution of a claimant where there has been a mistake as to the existence of a firm, see CPR 19(2); and *Noble Lowndes & Partners v Hadfields Ltd* [1939] Ch 569; *W Hill & Son v Tannerhill* [1944] 1 KB 472, CA.

⁷ For an exceptional case where it was held that the service of a writ on a partnership was valid, notwithstanding that the partnership had already, and by the date of such service, become a limited company see *Willmott v Berry Bros (a firm)* (1981) 126 Sol Jo 209, CA (newly formed company had taken no steps to inform the public of its incorporation and had continued to trade at its old place of business without apparent

change; it was held that, in those circumstances, service upon the partnership could be identified as service upon the same business as that which actually comprised the limited company); and see PARA 84 note 4.

8 See CPR 7.2A; *Practice Direction--How to Start Proceedings* PD 7 para 5A.1, 5A.3.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(i) Claims by Partners and Firms/80. Requirement for partnership to be carrying on business in the jurisdiction.

80. Requirement for partnership to be carrying on business in the jurisdiction.

Partners¹ may only sue or be sued in the name of the firm² if they carry on business within the jurisdiction at the time when the cause of action accrued³. If the firm has an office of its own in England and Wales at which a partner or manager is in control carrying on the business, that is sufficient⁴. The fact that a partner resides in, or comes regularly to, England or Wales for the purpose of transacting business for the firm is not sufficient⁵. If the firm has only an office in England and Wales where business for the firm is done by an agent, the question whether it is carrying on business within the jurisdiction depends on the agent's powers and authority⁶. These rules apply to Scottish, Irish or colonial firms in the same manner as they do to foreign firms, for the question does not depend on allegiance but on jurisdiction⁷.

1 'Partners' includes persons claiming to be entitled as partners and persons alleged to be partners: CPR 7.2A; *Practice Direction--How to Start Proceedings* PD 7 para 5A.2.

2 As to the firm name see PARA 7.

3 *Practice Direction--How to Start Proceedings* PD 7 para 5A.1. See further **CIVIL PROCEDURE**.

4 *Shepherd v Hirsch, Pritchard & Co* (1890) 45 ChD 231; *Lysaght v Clark & Co* [1891] 1 QB 552, DC; *Worcester City and County Banking Co v Firbank, Pauling & Co* [1894] 1 QB 784, CA.

5 *Western National Bank of City of New York v Perez, Triana & Co* [1891] 1 QB 304, CA; *Indigo Co v Ogilvy* [1891] 2 Ch 31, CA; *Heinemann & Co v Hale & Co* [1891] 2 QB 83, CA; *Singleton v Roberts, Stocks & Co* (1894) 70 LT 687, DC. A stand taken for nine days at a show may be a fixed place of business sufficient to bring a firm within the jurisdiction: *Dunlop Pneumatic Tyre Co Ltd v AG für Motor und Motorfahrzeugbau vorm Cudell & Co* [1902] 1 KB 342, CA. See further the cases cited in PARA 84 et seq (proceedings against a firm).

6 Thus, it is not sufficient if the agent merely has authority to take orders or to show samples: *Baillie v Goodwin* (1886) 33 ChD 604; *Grant v Anderson & Co* [1892] 1 QB 108, CA, followed and applied in *Okura & Co Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715, CA (foreign corporation employed an agent in England); and see *The Lalandia* [1933] P 56. If, however, the agent has power to contract on behalf of the firm, it is otherwise: *Compagnie Générale Trans-Atlantique v Thomas Law & Co, La Bourgogne* [1899] AC 431, HL; *Dunlop Pneumatic Tyre Co Ltd v AG für Motor und Motorfahrzeugbau vorm Cudell & Co* [1902] 1 KB 342, CA; *Thames and Mersey Marine Insurance Co v Societa di Navigazione a Vapore del Lloyd Austriaco* (1914) 111 LT 97, CA.

7 *Worcester City and County Banking Co v Firbank, Pauling & Co* [1894] 1 QB 784 at 787, CA, per Lord Esher MR. A foreign firm may, however, agree to accept service within the jurisdiction: *Tharsis Sulphur and Copper Co Ltd v Société des Métaux* (1889) 58 LJQB 435, DC.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(i) Claims by Partners and Firms/81. Individual partners suing in firm name.

81. Individual partners suing in firm name.

Where the partnership has a name, unless it is inappropriate to do so, claims must be brought in the name under which that partnership carried on business at the time the cause of action accrued¹. If partners object to one of their number suing a third person in the firm's name, he may be ordered to indemnify them against the costs². Claims by the partnership may be made either against a stranger or against a member of the firm³.

1 CPR 7.2A; *Practice Direction--How to Start Proceedings* PD 7 para 5A.3. There may have been a change in the personnel of the firm between the date of the cause of action and the issue of the claim form. This is of importance where the firm is the defendant: see PARA 89. See further **CIVIL PROCEDURE**. As to the firm name see PARA 7.

2 *Whitehead v Hughes* (1834) 2 Cr & M 318; *Seal and Edgelow v Kingston* [1908] 2 KB 579, CA.

3 As to claims by firms against their own partners see PARA 82.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(i) Claims by Partners and Firms/82. Claims by firms against own partners or firms with a common partner.

82. Claims by firms against own partners or firms with a common partner.

A partnership may bring a claim against its own member, but a firm claiming money due from one of its partners in connection with the firm can only obtain a partnership account¹.

Where two firms share one or more partners, either firm may sue the other in the firm name² if both firms carry on business within the jurisdiction³.

1 See *Meyer & Co v Faber (No 2)* [1923] 2 Ch 421, CA (where it was held that the members of the partnership, either in the firm's name or as individuals, could not sue another member of the partnership for sums which he happened to have in his hands without taking the partnership accounts, the only relief available being in respect of money found to be owing to the other members of the partnership as the result of the taking of an account of partnership dealings); and see PARAS 5 note 1, 135, 158. The court will not require the taking of an account where to do so would serve no useful purpose: see *Brown v Rivlin* [1983] CA Transcript 56, applying *Gopala Chetty v Vijayaraghavachariar* [1922] 1 AC 488; *Sobell v Boston* [1975] 2 All ER 282, [1975] 1 WLR 1587; PARAS 5 note 1, 158. As to claims for an account see **EQUITY** vol 16(2) (Reissue) PARA 449 et seq; and PARA 150 et seq. As to the nature of the relationship between partners, and as to the remedies which a partner has against his co-partners for breach of the duty of good faith, see PARA 106.

2 As to the firm name see PARA 7.

3 See CPR 7.2A; *Practice Direction--How to Start Proceedings* PD 7 para 5A. See further **CIVIL PROCEDURE**.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(i) Claims by Partners and Firms/83. Set-off of debt of individual partner.

83. Set-off of debt of individual partner.

A debt owed by a partner to a third person may not be set off by that third person against a claim for a debt owed by him to the firm¹. This rule is subject to contrary agreement, and does not apply if the indebted partner was the only apparent owner of the business of the firm when the debt to the firm was incurred², or has become the sole owner under an agreement which operates as a novation of the debt owing to the firm³.

1 *Gordon v Ellis* (1846) 3 Dow & L 803; *Jebsen v East and West India Dock Co* (1875) LR 10 CP 300. Cf *Jackson v Yeats* [1912] 1 IR 267 (where it was held that there was no right of retainer in respect of a debt due by a legatee to the firm in which the testator was a partner); and conversely *Re Pennington and Owen Ltd* [1925] Ch 825, CA (where it was held that a debt due by a partnership firm cannot be set off against a separate debt due to one of the partners). Similarly, where a firm has a bank account at a bank at which a partner also has a private account, it is probably true that debts outstanding in the one account may not be set off against the other unless the partner holds his private account merely as nominee for the firm; see *quaere*. For non-partnership cases see *Bhogal v Punjab National Bank*, *Basna v Punjab National Bank* [1988] 2 All ER 296, CA; *Uttamchandani v Central Bank of India* (1989) 133 Sol Jo 262, CA; but see *M S Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, [1993] 3 All ER 769, CA (where the director of a company which owed money to the insolvent bank and who had guaranteed the company's debt was able to set off the sums he was owed by the bank in his private account against his liability under the guarantee); distinguished in *Re Bank of Credit and Commerce International SA* (1994) Times, 22 March; and see *Stein v Blake* [1994] Ch 16, [1993] 4 All ER 225, CA. As to the nature of a bank's right of set-off see *Re K* [1990] 2 QB 298, [1990] 2 All ER 562; **CIVIL PROCEDURE** vol 11 (2009) PARA 634 et seq. As to set-off in corporate insolvency see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 792.

2 *Stracey and Ross v Deey* (1789) 7 Term Rep 361n; *Muggeridge's v Smith & Co* (1884) 1 TLR 166; cf *Baker v Gent* (1892) 9 TLR 159. See also *Spurr v Cass*, *Cass v Spurr* (1870) LR 5 QB 656.

3 *Burgess v Morton* (1894) 10 TLR 339, CA (revsd [1896] AC 136, HL, solely on the ground that the Court of Appeal was not competent to hear an appeal from a judge determining a question as arbitrator by agreement).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(ii) Claims against Partners and Firms/84. Claims against partnerships.

(ii) Claims against Partners and Firms

84. Claims against partnerships.

Two or more persons carrying on business within the jurisdiction¹ must be sued in the name of the firm² of which they were partners³ at the time when the cause of action accrued, unless it is inappropriate to do so⁴.

¹ As to what amounts to carrying on business within the jurisdiction see PARA 80.

A foreign firm can agree that service on an agent within the jurisdiction is to be valid (*Montgomery, Jones & Co v Liebenthal & Co* [1898] 1 QB 487, CA), but it cannot agree that the court is to have power to direct service upon it out of the jurisdiction (*British Wagon Co v Gray* [1896] 1 QB 35, CA). In the absence of any such agreement, if a firm does not carry on business within the jurisdiction, it is a foreign firm and the partners must be sued individually, and service of a claim form in the firm name has no effect: *Western National Bank of City of New York v Perez, Triana & Co* [1891] 1 QB 304, CA. See also *Indigo Co v Ogilvy* [1891] 2 Ch 31, CA; *Dobson v Festi, Rasini & Co* [1891] 2 QB 92, CA; *Von Hellfeld v Rechnitzer and Mayer Frères & Co* [1914] 1 Ch 748, CA (service out of the jurisdiction in the firm name upon a foreign partnership not carrying on business in England was set aside, in the absence of evidence that by the foreign law a partnership was a totally different legal entity from the individuals who composed it). If a foreign firm brings a claim within the jurisdiction, a counterclaim may be made against it (*Griendtveen v Hamlyn & Co* (1892) 8 TLR 231); but cf *South African Republic v La Compagnie Franco-Belge du Chemin de Fer du Nord* [1897] 2 Ch 487, CA (inability to bring an independent claim held not to be a ground for allowing an inconvenient counterclaim). See, however, *Oxnard Financing SA v Rahn* [1998] 3 All ER 19, [1998] 1 WLR 1465, CA, where it was held possible to sue a foreign partnership which was not a corporation and did not carry on business within the jurisdiction in the English courts, either by naming as defendants the individual natural persons who were partners in it, who traded under that name and who were sued in that capacity as partners, or by reference to the partnership entity itself. See further **CIVIL PROCEDURE**.

² As to the firm name see PARA 7.

³ See PARA 80 note 1.

⁴ CPR 7.2A; *Practice Direction--How to Start Proceedings* PD 7 paras 5A.1, 5A.3. See also *Western National Bank of City of New York v Perez, Triana & Co* [1891] 1 QB 304, CA. It is not apparent what circumstances may be deemed 'inappropriate' for these purposes. As to claims against individual partners see PARA 85.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(ii) Claims against Partners and Firms/85. Claims against individual partners.

85. Claims against individual partners.

Subject to the requirement to bring claims against the name under which the partnership carried on business at the time the cause of action accrued¹, a claimant may in certain circumstances sue all the partners individually²; but then they must all be made defendants. If he sues some only of the partners, the defendants can insist on the other partners being made parties if they are within the jurisdiction and can be found³; but an active partner who has ordered goods may be sued alone and cannot plead the joint liability of a sleeping partner as a defence⁴.

1 See the requirement in CPR 7.2A; *Practice Direction--How to Start Proceedings* PD 7 paras 5A.1, 5A.3; see PARA 84. Prior to the enactment of the Civil Procedure Rules, suing partners in their firm name was optional: see the permissive wording in RSC Ord 81 (repealed).

2 *Practice Direction--How to Start Proceedings* PD 7 para 5A.3 applies only where the partnership has a name, and provides that the claim must be brought against the name under which the partnership carried on business at the time when the cause of action accrued unless it is inappropriate to do so. The CPR do not define the circumstances that may be deemed 'inappropriate' for these purposes.

3 *Robinson v Geisel* [1894] 2 QB 685 at 687, CA. He need not join a sleeping partner as defendant if his contract had been made with one partner only, who concealed from him the fact of the partnership: see *Mullett v Hook* (1827) Mood & M 88, overruling *Dubois v Ludert* (1814) 5 Taunt 609; *De Mautort v Saunders* (1830) 1 B & Ad 398.

4 *Ex p Hodgkinson* (1815) 19 Ves 291; *Ex p Norfolk* (1815) 19 Ves 455; *Re Starkey and Whiteside, ex p Chuck* (1832) 8 Bing 469.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(ii) Claims against Partners and Firms/86. Unsatisfied judgment against one partner no bar to claim against others.

86. Unsatisfied judgment against one partner no bar to claim against others.

In a claim to enforce the joint liability of partners, an unsatisfied judgment against one of them is no bar to a future claim against the others¹.

¹ Civil Liability (Contribution) Act 1978 s 3, reversing the effect of *King v Hoare* (1844) 13 M & W 494; *Kendall v Hamilton* (1879) 4 App Cas 504, HL. See also *Liverpool Borough Bank v Walker* (1859) 4 De G & J 24; *Plumer v Gregory* (1874) LR 18 Eq 621; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177, CA; *Blyth v Fladgate, Morgan v Blyth, Smith v Blyth* [1891] 1 Ch 337 at 353; *Re Outram, ex p Ashworth and Outram* (1893) 63 LJB 308, DC.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(ii) Claims against Partners and Firms/87. Claim against personal representatives.

87. Claim against personal representatives.

If all the partners are dead, the personal representatives of the last survivor may be sued in respect of a liability of the firm without making the personal representatives of the others defendants¹.

¹ *Golding v Vaughan* (1782) 2 Chit 436; *Calder v Rutherford* (1822) 3 Brod & Bing 302; and see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 780 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(ii) Claims against Partners and Firms/88. Service of claim form on a partnership.

88. Service of claim form on a partnership.

The claim form may be served personally on a partnership where partners are being sued in the name of their firm by leaving it with: (1) a partner¹; or (2) a person who, at the time of service, has the control or management² of the partnership business at its principal place of business³. A claim form or particulars of claim which are served by leaving them with a person at the principal or last known place of business of the partnership, must at the same time have served with them a notice as to whether that person is being served: (a) as a partner; (b) as a person having control or management of the partnership business; or (c) as both⁴.

Where no solicitor is acting for the party to be served, and the individual who is being sued in the name of the firm has not given an address for service, the document must be sent or transmitted to, or left at his usual or last known residence, or the principal or last known place of business of the firm⁵.

Where it appears to the court that there is a good reason to authorise service by a method not permitted by the Civil Procedure Rules, the court may make an order permitting service by an alternative method⁶.

¹ CPR 6.4(5)(a); *Practice Direction--Service* PD 6 para 4.1. As to service of documents see further **CIVIL PROCEDURE** vol 11 (2009) PARA 138 et seq.

² This does not include an agent of the firm whose only duty is to show samples and transmit orders (*Baillie v Goodwin* (1886) 33 ChD 604); or a receiver and manager appointed by the court, since the person served must have control and management under authority from the partners, and must thus be the servant of the firm (*Re Flowers & Co* [1897] 1 QB 14, CA (a bankruptcy case)). See *Kenneth Allison Ltd v A E Limehouse & Co (a firm)* [1992] 2 AC 105, [1991] 4 All ER 500, HL (a case concerning RSC Ord 81 r 3 (now repealed); where service was effected not upon the person having control or management of the partnership business, but upon an employee who had been given express authority by a partner to accept service of proceedings, and the plaintiff relied upon this authorisation by handing the writ to that employee, such service, although not complying with rules of court, did constitute valid service). As to whether service on the person having control or management of the partnership business is good service where the firm has, by the date of service, become incorporated see *Willmott v Berry Bros (a firm)* (1981) 126 Sol Jo 209, CA (service on a defendant firm at its old place of business constituted good service, even though, unbeknown to the plaintiff, the firm had, by that date, already become a limited company; after incorporation the defendant had continued to trade and let itself be known as a partnership)

³ CPR 6.4(5)(b); *Practice Direction--Service* PD 6 para 4.1. Where service was effected upon a person having control and five days later upon a partner, and judgment in default was signed on the first service before the eight days had elapsed from service on the partner, the judgment was set aside: *Alden v Beckley & Co* (1890) 25 QBD 543, DC. As to what comprises a principal place of business see *Weatherley v Calder & Co* (1889) 61 LT 508, DC (partnership); cf *Davies v British Geon Ltd* [1957] 1 QB 1, [1956] 3 All ER 389, CA (company).

⁴ *Practice Direction--Service* PD 6 para 4.2.

⁵ CPR 6.6; *Practice Direction--Service* PD 6 para 4.1. See *Austin Rover Group v Crouch Butler Savage Associates (a firm)* [1986] 3 All ER 50, [1986] 1 WLR 1102, CA (even where a copy of the writ had been sent to the wrong address, the service would still be treated as good service if the copy did actually come into the hands of a partner at the correct address).

⁶ CPR 6.8. Service by an alternative method (or substituted service as it was formerly called) has, for example, been ordered where there was no person in apparent control and no partner could be served: see *Shillito v Child & Co* [1883] WN 208. See also *Worcester City and County Banking Co v Firbank, Pauling & Co* [1894] 1 QB 784 at 788, CA, per Lord Esher MR (substituted service cannot be ordered upon a partner who is resident out of the jurisdiction by service upon someone in England and Wales); cf *Coles v Gurney* (1815) 1 Madd 187; *Figgins v Ward* (1834) 2 Cr & M 424; *Leese v Martin* (1871) LR 13 Eq 77. As to service out of the

jurisdiction see *Practice Direction--Service Out of the Jurisdiction* PD 6B; and **CIVIL PROCEDURE** vol 11 (2009) PARA 156 et seq.

UPDATE

88 Service of claim form on a partnership

TEXT AND NOTES--CPR Pt 6 substituted by SI 2008/2178.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(ii) Claims against Partners and Firms/89. Acknowledgment of service.

89. Acknowledgment of service.

Where a claim is brought against a partnership, service must be acknowledged in the name of the partnership on behalf of all persons who were partners at the time when the cause of action accrued¹. The acknowledgment of service may be signed by any of those partners, or by any person authorised by any of those partners to sign it².

¹ *Practice Direction--Acknowledgement of Service* PD10 para 4.4(1). As to acknowledgment of service see further **CIVIL PROCEDURE** vol 11 (2009) PARAS 184-186.

² *Practice Direction--Acknowledgement of Service* PD10 para 4.4(2).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(ii) Claims against Partners and Firms/90. Partnership member statements.

90. Partnership member statements.

A partnership membership statement is a written statement of the names and last known places of residence of all the persons who were partners in the partnership at the time when the cause of action accrued¹. If the partners are requested to provide a copy of a partnership membership statement by any party to a claim, the partners must do so within 14 days of receipt of the request². In that request the party seeking a copy of a partnership membership statement must specify the date when the relevant cause of action accrued³.

1 CPR 7.2A; *Practice Direction--How to Start Proceedings* PD 7 para 5B.1.

2 CPR 7.2A; *Practice Direction--How to Start Proceedings* PD 7 para 5B.2.

3 CPR 7.2A; *Practice Direction--How to Start Proceedings* PD 7 para 5B.3.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(ii) Claims against Partners and Firms/91. Disclosure of partnership books.

91. Disclosure of partnership books.

If partnership books are produced in a claim relating to the business of the firm, the partners may seal up all entries other than those which relate to the cause of action¹.

¹ *Re Pickering, Pickering v Pickering* (1883) 25 ChD 247, CA. As to disclosure of documents see **CIVIL PROCEDURE** vol 11 (2009) PARA 538 et seq. As to the effect on the firm of admissions or representations made by one partner concerning the partnership affairs see PARA 63. As to the production of books in partnership claims see PARA 137.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(iii) Judgments and Execution against Partners and Firms/92. Enforcing a judgment or order against a partnership.

(iii) Judgments and Execution against Partners and Firms

92. Enforcing a judgment or order against a partnership.

A judgment or order made against a partnership may be enforced against any property of the partnership within the jurisdiction¹.

A judgment or order made against a partnership may be enforced against any person who is not a limited partner and who:

- 3 (1) acknowledged service of the claim form as a partner²;
- 4 (2) having been served as a partner with the claim form, failed to acknowledge service of it³;
- 5 (3) admitted in his statement of case that he is or was a partner at a material time⁴; or
- 6 (4) was found by the court to have been a partner at a material time⁵.

However, a judgment or order made against a partnership may not be enforced against a limited partner or a member of the partnership who was ordinarily resident outside the jurisdiction when the claim form was issued unless he:

- 7 (a) acknowledged service of the claim form as a partner⁶;
- 8 (b) was served within the jurisdiction with the claim form as a partner⁷; or
- 9 (c) was served out of the jurisdiction with the claim form, as a partner, with the permission of the court⁸.

A judgment creditor wishing to enforce a judgment or order against a person in any other circumstances⁹ must apply to the court for permission to enforce the judgment or order¹⁰.

1 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 6A.1. As to execution against partnership property for the separate debt of a partner see PARA 95 et seq.

2 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 6A.2(1). As to acknowledgement of service see PARA 89.

3 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 6A.2(2).

4 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 6A.2(3).

5 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 6A.2(4). See *Clark v Cullen* (1882) 9 QBD 355, DC; *Western National Bank of City of New York v Perez, Triana & Co* [1891] 1 QB 304, CA; *Re Handford, Frances & Co, ex p Handford, Frances & Co* [1899] 1 QB 566 at 570, CA. It has been suggested that, where one partner dies before the claim is brought or between service of the claim form and judgment, judgment can only be obtained against the surviving partners and be enforced against them and the partnership assets if the legal personal representatives of the deceased partner are added as parties. Where all the partners die after service but before judgment, judgment cannot be entered at all: *Ellis v Wadeson* [1899] 1 QB 714 at 718, 719, CA, per Romer LJ. Whether the claim could be continued against the personal representatives depends upon the nature of the claim: see *Kirk v Todd* (1882) 21 ChD 484, CA; *Ellis v Wadeson* above at 718. As to the effect of the death of parties and the survival of rights of action see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814 et seq.

- 6 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 6A.3(1).
- 7 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 6A.3(2).
- 8 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 6A.3(3).
- 9 le in circumstances not set out in *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 6A.2 or para 6A.3; see the text and notes 2-8.
- 10 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 6A.4.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(iii) Judgments and Execution against Partners and Firms/93. Effect of judgment against a single partner.

93. Effect of judgment against a single partner.

Judgment for debt or damage recovered against one person is no bar to a claim against any other person jointly liable in respect of the same debt or damage¹. On the application of a judgment creditor, a partner's share in the firm may be charged².

1 See the Civil Liability (Contribution) Act 1978 s 3; and PARA 86 note 1. As to entitlement to contribution see s 1; and **TORT** vol 97 (2010) 450 et seq. As to a partner's right to indemnity see PARA 138 et seq.

2 See PARA 96.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(iii) Judgments and Execution against Partners and Firms/94. Attachment of debts owed by a partnership.

94. Attachment of debts owed by a partnership.

Where debts are due or accruing due to a judgment creditor from a partnership¹, an interim third party debt order² relating to such debts must be served on:

- 10 (1) a member of the partnership within the jurisdiction³;
- 11 (2) a person authorised by a partner⁴; or
- 12 (3) some other person having the control or management of the partnership business⁵.

Where an interim third party debt order requires a partnership to appear before the court, it will be sufficient for a partner to appear before the court⁶.

1 *Practice Direction-- Third Party Debt Orders* PD 72 para 3A.1.

2 *le* under CPR 72.4(2): see **CIVIL PROCEDURE**.

3 *Practice Direction-- Third Party Debt Orders* PD 72 para 3A.2(1).

4 *Practice Direction-- Third Party Debt Orders* PD 72 para 3A.2(2).

5 *Practice Direction-- Third Party Debt Orders* PD 72 para 3A.2(3). As to persons having control or management of the partnership business see PARA 88 note 2.

6 *Practice Direction-- Third Party Debt Orders* PD 72 para 3A.3.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(iii) Judgments and Execution against Partners and Firms/95. Enforcement of judgment for separate debts.

95. Enforcement of judgment for separate debts.

Execution cannot be levied against partnership property for the separate debt of a partner¹, but the court² on the application³ of the judgment creditor of a partner may make an order charging the share of the partner who is a judgment debtor with payment of the amount of the judgment debt and the interest on it⁴.

1 Partnership Act 1890 s 23(1) ('a writ of execution may not issue on any partnership property except on a judgment against the firm'). As to legal proceedings against a firm generally see PARA 84. As to judgments against firms see PARA 92. A charging order may be made against a partner's interest as such, subject to his co-partner's right to redeem the interest charged: see PARA 98.

2 For these purposes, 'court' means the High Court or a county court: Partnership Act 1890 s 23(2) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt II). The powers conferred on a judge by the Partnership Act 1890 s 23 may be exercised by a Master, the Admiralty Registrar, or a district judge: CPR 73.22; *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 6.3.

3 Applications for an order under the Partnership Act 1890 s 23 made by a judgment creditor of a partner, and applications for any order by a partner of the judgment debtor in consequence of any application made by the judgment creditor under s 23, must be made in accordance with CPR Pt 23: *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 paras 6.1, 6.2. Every application notice filed by a judgment creditor, and every order made following such an application, must be served on the judgment debtor and on any of the other partners that are within the jurisdiction: *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 6.4. Every application notice filed by a partner of a judgment debtor, and every order made following such an application, must be served on the judgment creditor and the judgment debtor, and on the other partners of the judgment debtor who are not joined in the application and who are within the jurisdiction: *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 6.5. An application notice or order served on one or more, but not all, of the partners of a partnership is deemed to have been served on all the partners of that partnership: *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 6.6.

4 Partnership Act 1890 s 23(2).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(iii) Judgments and Execution against Partners and Firms/96. Effect of charging order.

96. Effect of charging order.

The effect of a charging order¹ is the same as if the partner had executed or signed a document charging his share with the debt². Such an order is valid even if the indebted partner is a person suffering from a mental disorder³, but may not be made over a deceased partner's share held by his executors⁴. If the indebted partner becomes a bankrupt, the charging order does not take priority over the title of his trustee in bankruptcy⁵.

1 As to the procedure to be followed when applying for a charging order see PARA 95.

2 *Brown, Janson & Co v A Hutchinson & Co* [1895] 2 QB 126 at 131, CA; and see the Partnership Act 1890 ss 23(2), 31(1); PARAS 95, 126; and **BANKRUPTCY AND INSOLVENCY** vol 3(2) (2002 Reissue) PARA 685. Quaere to what extent the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1) (a contract for the sale or other disposition of land to be made in writing signed by or on behalf of the parties and incorporating all the terms of such sale or other disposition: see PARA 39 note 7; and **SALE OF LAND**) affects charges on land created without complying with such requirements: see **EQUITY** vol 16(2) (Reissue) PARA 606. As to the nature of a partner's share see PARA 122 et seq.

3 *Re Seager Hunt* [1900] 2 Ch 54n. The rule applies to a partner in a foreign firm having a branch in England and Wales: *Brown, Janson & Co v Hutchinson & Co* [1895] 1 QB 737, CA.

4 *Stewart v Rhodes* [1900] 1 Ch 386, CA.

5 This principle stems from the fact that a charging order made under the Partnership Act 1890 s 23 was not regarded as a completed execution for the purposes of the Bankruptcy Act 1914 s 40 (repealed): see *Re Hutchinson, ex p Hutchinson* (1885) 16 QBD 515 and *Wild v Southwood* [1897] 1 QB 317, following *Re O'Shea's Settlement, Courage v O'Shea* [1895] 1 Ch 325, CA; cf *Re Gershon and Levy, ex p Coote and Richards, ex p Westcott & Sons* [1915] 2 KB 527 (where the doctrine of relation back applied to an equitable charge obtained by solicitors and the charging order was not binding on the trustee). Whilst the doctrine of relation back has no application under the Insolvency Act 1986, it is apprehended that the same rule would apply (both to corporate and individual partners) where the indebted partner is adjudged bankrupt or where the partnership is wound up as an insolvent company, as the case may be, under the Insolvency Act 1986; sed quaere. As to partnership insolvency proceedings generally see PARA 99; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1166-1301.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(iii) Judgments and Execution against Partners and Firms/97. Ancillary relief; receivers, accounts and inquiries.

97. Ancillary relief; receivers, accounts and inquiries.

When a charging order is made¹, the court² may appoint, by the same or a subsequent order, a receiver³ of the partner's share of profits, whether already declared or accruing, and of any other money coming to him from the partnership⁴. It may also direct such accounts and inquiries and give such orders and directions as it might have done if the charge had been made by the partner in favour of the judgment creditor, or as the case may require⁵; but this jurisdiction is discretionary and will be exercised only in special circumstances, for example with a view to a dissolution⁶.

1 As to the procedure to be followed when applying for a charging order see PARA 95.

2 As to the meaning of 'court' see PARA 95 note 2.

3 See **CIVIL PROCEDURE** vol 12 (2009) PARAS 1501 et seq. As to the right of a partner generally to apply for the appointment of a receiver see PARA 162.

4 Partnership Act 1890 s 23(2). As to the effect of the appointment of a receiver by the court see *Brown, Janson & Co v A Hutchinson & Co* [1895] 1 QB 737 at 740, CA; and **RECEIVERS** vol 39(2) (Reissue) PARA 373 et seq.

5 Partnership Act 1890 s 23(2). As to the rights of a chargee see PARA 126.

6 *Brown, Janson & Co v Hutchinson & Co* [1895] 2 QB 126 at 130, 131, CA. An account will not, as a rule, be ordered during the continuance of a partnership: *Brown, Janson & Co v Hutchinson & Co* at 132. As to accounts between partners see PARA 150 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(iii) Judgments and Execution against Partners and Firms/98. Rights of other partners when one partner's interest is charged.

98. Rights of other partners when one partner's interest is charged.

The partners or partner of a member of a firm whose interest has been charged¹ are at liberty at any time to redeem it², or, in the case of a sale being directed by the court, to purchase it³, or they may dissolve the partnership⁴.

1 le under the Partnership Act 1890 s 23: see PARA 95 et seq.

2 Partnership Act 1890 s 23(3).

3 Partnership Act 1890 s 23(3): see *Perens v Johnson, Johnson v Perens* (1857) 3 Sm & G 419.

4 Partnership Act 1890 s 33(2); and see PARA 177.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(2) LEGAL PROCEEDINGS/(iv) Insolvency Proceedings/99. Insolvency proceedings.

(iv) Insolvency Proceedings

99. Insolvency proceedings.

The Lord Chancellor may, by order¹, provide that such provisions of the Insolvency Act 1986 as may be specified in the order are to apply in relation to insolvent partnerships with such modifications as may be specified². Such an order may make different provision for different cases and may contain such incidental, supplemental and transitional provisions as may appear to the Lord Chancellor and the Lord Chief Justice necessary or expedient³.

The current order is the Insolvent Partnerships Order 1994⁴ which contains provisions relating to the following:

- 13 (1) voluntary arrangements for insolvent partnerships⁵;
- 14 (2) administrations for insolvent partnerships⁶;
- 15 (3) winding up of an insolvent partnership as an unregistered company on the petition of a creditor where no concurrent petition is presented against a member⁷;
- 16 (4) winding up of an insolvent partnership as an unregistered company on the petition of a creditor where concurrent petitions are presented against one or more members⁸;
- 17 (5) winding up of an insolvent partnership as an unregistered company on a member's petition where no concurrent petition is presented against a member⁹;
- 18 (6) winding up of an insolvent partnership as an unregistered company on a member's petition where concurrent petitions are presented against all members¹⁰;
- 19 (7) insolvency proceedings not involving the winding up of an insolvent partnership as an unregistered company where individual members present a joint bankruptcy petition¹¹; and
- 20 (8) winding up of an unregistered company which is a member of an insolvent partnership being wound up by virtue of the Insolvent Partnerships Order 1994¹².

Where an insolvent partnership is wound up as an unregistered company under Part V of the Insolvency Act 1986¹³, certain provisions of the Company Directors Disqualification Act 1986¹⁴ apply with modifications¹⁵.

The above provisions do not affect the position where executors carry on a testator's business; if the executors are acting purely in their capacity as such and are not partners with each other, they cannot be adjudicated bankrupt as partners¹⁶.

1 ie by order made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament, with the concurrence of the Secretary of State and the Lord Chief Justice: Insolvency Act 1986 s 420(1), (3) (s 420(1) amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 185, 191). The Lord Chief Justice may nominate a judicial office holder (see the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Insolvency Act 1986 s 420: s 420(4) (added by the Constitutional Reform Act 2005 Sch 4 paras 185, 191). See also the Insolvency Act 1986 s 420(1A), (1B) (added by SI 2002/1037); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 817, 823; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1166.

2 Insolvency Act 1986 s 420(1). Partnership insolvency is covered in detail elsewhere in this work: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1166-1301.

- 3 Insolvent Partnership Act 1986 s 420(2).
- 4 See the Insolvent Partnerships Order 1994, SI 1994/2421.
- 5 See the Insolvent Partnerships Order 1994, SI 1994/2421, arts 4, 5 (amended by SI 2002/2708); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1169-1190.
- 6 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 6 (substituted by SI 2005/1516); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1192-1203.
- 7 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 7 (amended by SI 1996/1308; SI 2002/1308); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1204-1217.
- 8 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 8 (amended by SI 2002/1308; SI 2006/622); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1218-1253.
- 9 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 9; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1254-1258.
- 10 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 10 (amended by SI 2005/1516; SI 2006/622); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1260-1265.
- 11 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 11; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1266-1291.
- 12 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 12; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1292.
- 13 See the Insolvent Partnership Act 1986 Pt V (ss 220-229); see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1147 et seq.
- 14 See the Company Directors Disqualification Act 1986 ss 1, 1A, 6-10, 13-15, 17, 19(c), 20, Sch 1: see **COMPANIES** vol 15 (2009) PARA 1575 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1107 et seq.
- 15 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 16 (amended by SI 2001/767); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1297-1302.
- 16 *Re Fisher & Sons* [1912] 2 KB 491. See also *Re C & M Ashberg* (1990) Times, 17 July (where it was held that the court had jurisdiction to wind up an insolvent partnership only where a partnership in fact existed; it was not sufficient to prove that the alleged partner had merely allowed herself to be held out as a partner where otherwise no partnership existed, and neither the Partnership Act 1890 s 14 (person liable by holding out: see PARAS 24, 26) nor the doctrine of estoppel would assist the petitioner).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(3) TAXATION/100. Liability to income tax and corporation tax.

(3) TAXATION

100. Liability to income tax and corporation tax.

Since a partnership has, in English law, no separate legal identity, but is recognised as nothing more than a useful means by which to refer to all the partners who, from time to time, make up the partnership, there would prima facie appear to be no reason for any special provisions to apply to partnerships in relation to income tax; each partner's liability therefor could simply be treated as part of his own individual taxation liability¹. For example, where a trade or profession is carried on by persons in partnership, the partnership is not, unless the contrary intention appears, to be treated for corporation tax purposes as an entity which is separate and distinct from those persons².

There are, however, special statutory provisions in respect of income tax relating to partners, the principal provisions concerning: (1) partnerships involving companies³; (2) limited partners⁴; (3) limited liability partnerships⁵; and (4) capital allowances⁶.

1 As to partnerships' lack of legal personality see PARA 2.

2 See the Income and Corporation Taxes Act 1988 s 111(1) (s 111 substituted by the Finance Act 1994 s 215; and amended by the Income Tax (Trading and Other Income) Act 2005 s 882(1), Sch 1 paras 1, 92); and **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1284, 1428. See also **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1427-1433.

3 See the Income and Corporation Taxes Act 1988 ss 114-116; and **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1430-1431.

4 See the Income and Corporation Taxes Act 1988 s 118; and **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1070-1071. As to limited partnerships see PARA 218 et seq.

5 See the Income and Corporation Taxes Act 1988 ss 118ZA-118ZD; and **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1432-1433.

6 See eg the Capital Allowances Act 2001 ss 557, 558; and **INCOME TAXATION**.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(3) TAXATION/101. Liability to capital gains tax.

101. Liability to capital gains tax.

Where two or more persons carry on a trade or business in partnership capital gains tax in respect of chargeable gains accruing to them on the disposal of any partnership assets must be assessed and charged on them separately¹; and any partnership dealings must be treated as dealings by the partners and not by the firm as such².

If a person resident in the United Kingdom (the 'resident partner') is a member of a partnership which resides outside the United Kingdom or which carries on any trade, profession or business the control and management of which is situated outside the United Kingdom, and any of the capital gains of the partnership are relieved³ from capital gains tax in the United Kingdom, then the arrangements do not affect any liability to capital gains tax in respect of the resident partner's share of any capital gains of the partnership⁴.

1 See the Taxation of Chargeable Gains Act 1992 s 59(1)(a) (s 59(1) renumbered by the Income Tax (Trading and Other Income) Act 2005 s 882(1), Sch 1 paras 426, 431); and **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 232. As to the liability of partners generally to capital gains tax see **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARAS 232-240.

2 See the Taxation of Chargeable Gains Act 1992 s 59(1)(b) (as renumbered (see note 1); and amended by the Finance Act 1995 s 162, Sch 29); and **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 232.

3 Ie by virtue of any arrangements falling within the Income and Corporation Taxes Act 1988 s 788: see **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1087-1090.

4 See the Taxation of Chargeable Gains Act 1992 s 59(2), (3) (added by the Income Tax (Trading and Other Income) Act 2005 Sch 1 paras 426, 431). As to the meaning of 'United Kingdom' see PARA 9 note 4.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(3) TAXATION/102. Liability to inheritance tax.

102. Liability to inheritance tax.

Inheritance tax¹, being chargeable primarily on death, renders the majority of inter vivos transfers of value potentially exempt, so that such transfers become chargeable only if the donor dies within the next seven years following the transfer². Thus, if, upon the commencement or during the continuation of the firm or upon the death or retirement of a partner, a gratuitous transfer or assignment of one or more partner's shares is effected³, such transfer or assignment will, in the usual case, constitute a potentially exempt transfer⁴.

1 As to inheritance tax generally see **INHERITANCE TAXATION**.

2 As to potentially exempt transfers see **INHERITANCE TAXATION** vol 24 (Reissue) PARAS 442-445.

3 Eg by the rearrangement of partners' capital-sharing ratios, by the acquisition of a share in the firm's assets by a new partner upon the basis of the written down value of the firm's capital assets, ie ignoring any capital profits, or by the provision of annuities to former partners and their dependants where, for example, although the former partner has given full consideration for the annuity, it is unenforceable or where the annuity is enforceable but was not included within the partnership agreement for full consideration. Upon the formation or dissolution of a partnership, or upon the death or retirement of a partner or upon the admission of a new partner, care should be taken to ensure that all the relevant reliefs, such as business property relief under the Inheritance Tax Act 1984 Pt V Ch 1 (ss 103-114: see **INHERITANCE TAXATION** vol 24 (Reissue) PARA 556 et seq) and agricultural property relief under Pt V Ch II (ss 115-124C: see **INHERITANCE TAXATION** vol 24 (Reissue) PARA 566 et seq) are utilised.

4 See note 2.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(3) TAXATION/103. Liability to VAT.

103. Liability to VAT.

The registration under the Value Added Tax Act 1994 of persons carrying on a business in partnership, or carrying on in partnership any other activities in the course or furtherance of which they acquire goods from other member states, may be in the name of the firm; and no account is to be taken, in determining for any purpose of that Act whether goods or services are supplied to or by such persons or are acquired by such persons from another member state, of any change in the partnership¹.

Until the date on which a change in the partnership is notified to the Commissioners for Her Majesty's Revenue and Customs a person who has ceased to be a member of a partnership is to be regarded as continuing to be a partner for the purposes of the Value Added Tax Act 1994 and, in particular, for the purpose of any liability for VAT on the supply of goods or services by the partnership or on the acquisition of goods by the partnership from another member state².

Where a person ceases to be a member of a partnership during a prescribed accounting period any notice which is served on the partnership and relates to, or to any matter arising in, that period or any earlier period during the whole or part of which he was a member of the partnership is to be treated as served also on him³.

These provisions⁴ do not affect the extent to which a partner is liable⁵ for VAT owed by the firm; but where a person is a partner in a firm during part only of a prescribed accounting period, his liability for VAT on the supply by the firm of goods or services during that accounting period or on the acquisition during that period by the firm of any goods from another member state is to be such proportion of the firm's liability as may be just⁶.

1 See the Value Added Tax Act 1994 s 45(1); and **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 77.

2 See the Value Added Tax Act 1994 s 45(2); and **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 77. Note that this provision is expressly without prejudice to the Partnership Act 1890 s 36 (rights of persons dealing with firm against apparent members of firm): see PARA 195.

3 See the Value Added Tax Act 1994 s 45(3); and **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 77. Any notice, whether of assessment or otherwise, which is addressed to a partnership by the name in which it is registered by virtue of s 45(1) and is served in accordance with the Value Added Tax Act 1994 is to be treated as served on the partnership and, accordingly, where s 45(3) applies, as served also on the former partner: see s 45(4); and **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 77. Note that this is expressly without prejudice to the Partnership Act 1890 s 16 (notice to acting partner to be notice to the firm): see PARA 45.

4 See the Value Added Tax Act 1994 s 45(1), (3): see the text and notes 1, 3.

5 See under the Partnership Act 1890 s 9: see PARA 74.

6 See the Value Added Tax Act 1994 s 45(5); and **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 77.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(3) TAXATION/104. National insurance contributions.

104. National insurance contributions.

Class 4 national insurance contributions in respect of partnership profits and gains may be charged on a partner separately or may be the subject of a joint assessment¹.

¹ See the Social Security Contributions and Benefits Act 1992 s 16(3), Sch 2 para 4(1), (2); and **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 43.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/2. RELATIONS BETWEEN PARTNERS AND THIRD PERSONS/(3) TAXATION/105. Liability to stamp duty and stamp duty land tax.

105. Liability to stamp duty and stamp duty land tax.

On normal principles, ad valorem stamp duty will be chargeable upon partners where they execute a deed or other document in order to effect a conveyance or transfer of any partnership asset, whether during the currency of the partnership or on its dissolution¹. For the purposes of stamp duty land tax, a chargeable interest held on behalf of a partnership is treated as held by or on behalf of the partners and a land transaction entered into for the purposes of a partnership is treated as entered into by or on behalf of all of the partners².

1 As to stamp duty on particular instruments see **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1027 et seq.

2 Finance Act 2003 Sch 15 para 2. As to stamp duty land tax see the Finance Act 2003 Pt 4 (ss 42-142); and **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(1) NECESSITY FOR GOOD FAITH/106. Basis of the relationship.

3. RELATIONS BETWEEN PARTNERS

(1) NECESSITY FOR GOOD FAITH

106. Basis of the relationship.

Ordinary partnerships are presumed by law to be based on the mutual trust and confidence of each partner in the integrity of every other partner; and as a result partners owe each other a duty of good faith¹. While a breach of this duty² may sound in damages³, it is not a universal rule⁴.

¹ This principle is firmly established in equity: see eg *Floydd v Cheney*, *Cheney v Floydd* [1970] Ch 602, [1970] 1 All ER 446; *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 All ER 1239, [1974] 1 WLR 605. 'In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other': *Const v Harris* (1824) Turn & R 496 per Lord Eldon LC. The principle is not expressly enunciated by the Partnership Act 1890, but it is recognised and embodied in the provisions contained in s 29 (see PARA 107) and s 30 (see PARA 108). As to the good faith required when serving a dissolution notice see *Walters v Bingham*, *Bingham v Walters* [1988] 1 FTLR 260 at 267, 268 obiter per Browne-Wilkinson V-C and *Peyton v Mindham* [1971] 3 All ER 1215 at 1221, [1972] 1 WLR 8 at 14. As to a solicitor's duty to disclose information to his partners, notwithstanding the duty of confidentiality which he owes to his clients, see *Moser v Cotton* [1990] NLJR 1313, CA. A partner owes his fellow partners a duty of care not to cause loss to the firm by rendering it liable in damages to third parties: *Ross Harper & Murphy v Banks* (2000) Times, 30 May, Ct Sess. Prospective partners have a duty to disclose all material matters in negotiating partnership agreements; although breach of the duty of disclosure would generally give rise merely to a right of rescission, where the breach of the duty of disclosure was fraudulent, a party to whom the duty was owed who suffered loss by reason of the breach might recover damages for that loss in the tort of deceit: see *Conlon v Simms* [2006] EWCA Civ 1749, [2007] 3 All ER 802.

It is now generally accepted that partners also owe each other a fiduciary duty. Strong authority for the proposition that partners do owe each other such a duty may be found in *Helmore v Smith* (1) (1887) 35 ChD 436 at 444, CA (where Bacon V-C stated that 'if fiduciary relation means anything, I cannot conceive a clearer case of fiduciary relation than that which exists between partners. Their mutual trust and confidence is the life blood of the concern. It is because they trust each other that they are partners in the first instance; it is because they continue to trust each other that the business goes on'); and in *Cassells v Stewart* (1881) 6 App Cas 64 at 79, HL (where Lord Blackburn said of a partner that it is 'because he is the agent that the fiduciary relation arises'); and see *Thompson's Trustee in Bankruptcy v Heaton* above at 1249 and at 612, 613 per Pennyquick V-C. However, in *Hogar Estates Ltd in Trust v Shebron Holdings Ltd* (1979) 25 OR (2d) 543, 101 DLR (3d) 509 (Ont) the High Court of Ontario warned against categorising the duty of a partner in this context; and see *Kingscroft Insurance Co Ltd v H S Weavers (Underwriting) Agencies Ltd* [1993] 1 Lloyd's Rep 187. As to the position where a partner holds money or other assets belonging to the firm see *Piddocke v Burt* [1894] 1 Ch 343 (where it was held that a partner who, as agent for the firm, received money from a third party, did not hold that money as trustee for his co-partners); but, in relation to the position where a firm has already been dissolved, see *Gordon v Gonda* [1955] 2 All ER 762 at 766, [1955] 1 WLR 885 at 893, 894, CA; *Roxburgh Dinardo & Partners' Judicial Factor v Dinardo* 1992 GWD 6-322 (where one partner held all the assets of the dissolved firm, the other all the liabilities and it was held that the former partner held the assets upon a constructive trust for the benefit of the latter).

As to fiduciary relationships generally see **EQUITY** vol 16(2) (Reissue) PARA 851 et seq.

² As to whether specific acts (or perhaps omissions) will be held to be in breach of the duty of good faith is a question of fact and will depend upon the circumstances of the case: see (in relation to employees) *Bliss v South East Thames Regional Health Authority* [1987] ICR 700, [1985] IRLR 308, CA (where it was held that the defendant's request that the plaintiff undergo a psychiatric examination, the plaintiff having written offensive letters to members of staff, constituted a repudiatory breach of the implied term of the contract between them); *United Bank Ltd v Akhtar* [1989] IRLR 507, EAT (exercise of a mobility clause).

³ See *Trimble v Goldberg* [1906] AC 494 at 500, PC, obiter per Lord Macnaghten; *Ferguson v Mackay* 1985 SLT 95. The principle that a breach of the duty of good faith may sound in damages may also be imported by

analogy from non-partnership cases (sed quaere): see *Sanders v Parry* [1967] 2 All ER 803, [1967] 1 WLR 753 (duty owed by employee); *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 at 605, 606, [1991] 1 WLR 589 at 597 per Browne-Wilkinson V-C (a pension fund case); *Downsview Nominees Ltd v First City Corp'n Ltd* [1993] AC 295, [1993] 3 All ER 626, PC (duty owed by mortgagee/receiver).

4 See eg *Uphoff v International Energy Trading Ltd* (1989) Times, 4 February, CA (where it was held that no claim for damages lay, even though the breach in question, namely non-disclosure between co-venturers, constituted a breach of a fiduciary nature). Where the duty is not fiduciary, a breach will not sound in damages: see *Banque Keyser Ullman SA v Skandia Life (UK) Insurance Co Ltd* [1990] 1 QB 665, [1990] 2 All ER 923; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 QB 818, [1989] 3 All ER 628, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(1) NECESSITY FOR GOOD FAITH/107. General duty to account for profit received.

107. General duty to account for profit received.

Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection¹. This also applies to transactions undertaken after a partnership has been dissolved by the death of a partner, and before its affairs have been completely wound up, either by any surviving partner or by the personal representatives of the deceased partner².

It follows that in the conduct of the firm's business a partner must not make any exclusive profit or private advantage for himself³. A new agreement which he makes after the partnership is dissolved but before it is wound up is a partnership asset⁴. A partner may, however, derive private benefit in matters entirely outside the scope of, and not in competition with, the partnership business by the use of information acquired in the partnership⁵. He may also, without his partners' knowledge, buy another partner's share in the firm or make a purchase which is not within the scope of, or in rivalry with or injurious to, the firm⁶. If he is the firm's landlord, he may forfeit the firm's lease⁷.

A partner must not place himself in a position which gives him a bias against the fair discharge of his duty to the firm⁸. A managing partner should enter in the partnership books all money which he withdraws for his separate use, and omission to do so or concealment of any such transaction may amount to fraud⁹.

1 Partnership Act 1890 s 29(1). See *Lindsley v Woodfull* [2004] EWCA Civ 165, [2004] 2 BCLC 131 (the duty to account may operate only for a limited and defined time if the partners expressly so agree). See also *John Taylors (a firm) v Masons (a firm)* [2001] EWCA Civ 2106, [2001] All ER (D) 381 (Nov).

2 Partnership Act 1890 s 29(2). See *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 All ER 1239, [1974] 1 WLR 605. A duty to account may also arise even before parties have become partners (see *Van Gestel v Cann* (1987) Times, 7 August, CA); but whether such a duty arises would appear to depend upon whether a special relationship is found to exist between intending partners (see PARAS 1 note 2, 106 note 1).

3 Cf *Hichens v Congreve* (1828) cited in 1 Russ & M 150; *Fawcett v Whitehouse* (1829) 1 Russ & M 132; *Gordon v Holland, Holland v Gordon* (1913) 108 LT 385, PC (where a partner improperly sold partnership assets to a purchaser for value without notice and repurchased them for himself, and was held liable to account for all profits made by him); *Blundon v Storm* [1972] SCR 135, 20 DLR (3d) 413, Can SC; *Hogar Estates Ltd in Trust v Shebron Holdings Ltd* (1979) 25 OR (2d) 543, 101 DLR (3d) 509 (Ont). For Warren J's analysis of the fiduciary duty of loyalty in partnership law see *Wilkinson v West Coast Capital* [2005] EWHC 3009 (Ch), [2005] All ER (D) 346 (Dec).

4 *Pathirana v Pathirana* [1967] 1 AC 233, [1966] 3 WLR 666, PC. As to the continuation of the partnership business after dissolution see PARA 198 et seq.

5 *Aas v Benham* [1891] 2 Ch 244, CA. Cf the position of those in a true fiduciary position: see **EQUITY** vol 16(2) (Reissue) PARAS 854-855. Quaere whether partners are or may be in a fiduciary position vis-à-vis their co-partners: see PARA 106.

6 *Cassels v Stewart* (1881) 6 App Cas 64, HL; *Trimble v Goldberg* [1906] AC 494, PC; *Hogar Estates Ltd in Trust v Shebron Holdings Ltd* (1979) 25 OR (2d) 543, 101 DLR (3d) 509 (Ont).

7 *Brenner v Rose* [1973] 2 All ER 535 at 539, [1973] 1 WLR 443 at 447 per Brightman J, referring to *Bevan v Webb* [1905] 1 Ch 620. Such forfeiture may, however, constitute a breach of trust as between himself and his co-partners: see *Sykes v Land* (1984) 271 Estates Gazette 1264, CA.

8 *Burton v Wookey* (1822) 6 Madd 367 (defendant obtained goods for the firm by bartering his own shop goods in exchange); *Bentley v Craven* (1853) 18 Beav 75; *Dunne v English* (1874) LR 18 Eq 524. A mere exposure to a temptation to be dishonest was not sufficient to justify the court's interference (*Glassington v Thwaites* (1823) 1 Sim & St 124); but this may no longer be good law (see *Hogar Estates Ltd in Trust v Shebron Holdings Ltd* (1979) 25 OR (2d) 543, 101 DLR (3d) 509 (Ont); and **EQUITY** vol 16(2) (Reissue) PARA 856).

9 *Re Hay, ex p Smith* (1821) 6 Madd 2.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(1) NECESSITY FOR GOOD FAITH/108. Duty not to compete with the firm.

108. Duty not to compete with the firm.

If a partner, without the consent of his co-partners, carries on any business of the same nature as, and competing with that of, the firm, he must account for and pay over to the firm all profits made by him in that business¹.

A covenant in a partnership agreement restraining competition between the partners may be enforced by the court².

1 Partnership Act 1890 s 30. See *Dean v MacDowell* (1878) 8 ChD 345, CA. Cf *Somerville v MacKay* (1810) 16 Ves 382; *Burton v Wookey* (1822) 6 Madd 367; *Russell v Austwick* (1826) 1 Sim 52; *Gardner v M'Cutcheon* (1842) 4 Beav 534; *Lock v Lynam* (1854) 4 I Ch R 188; *Miller v Mackay (No 2)* (1865) 34 Beav 295. See also *Carlyon-Britton v Lumb* (1922) 38 TLR 298 ('the salary from any office' held to include the pay received by a solicitor while an army officer during the 1914-18 war; decided not under the Partnership Act 1890 s 30 but upon the construction of the parties' partnership agreement).

2 As to covenants in restraint of competition see PARA 42; and **COMPETITION** vol 18 (2009) PARA 377 et seq. As to injunctions enforcing such covenants see PARA 166 et seq; and **CIVIL PROCEDURE** vol 11 (2009) PARA 457.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(1) NECESSITY FOR GOOD FAITH/109. Renewal of partnership lease.

109. Renewal of partnership lease.

The renewal of a lease of the partnership property by one or more of the partners without the privity of the others enures for the benefit of all¹. The rule is the same when the intention to renew is communicated to the others if they are prompt to assert their rights²; and it is immaterial whether the term of the partnership is definite or indefinite, or whether the landlord would have refused to renew to the partners who are not privy to the renewal³. The personal representatives of a deceased partner may have a right to share in the profits derived from a renewal of the lease by the surviving partner⁴. If one partner declines to concur in taking a renewed lease of property where a branch of the firm's business is carried on, and the partnership agreement provides that the business is to be carried on at such place as the partners agree, no other partner can take a renewed lease in his own name and insist upon continuing the branch on account of the firm⁵.

1 'The old lease was the foundation of the new lease; . . . the tenant-right of renewal arising out of the old lease giving the partners the benefit of this new lease': *Clegg v Fishwick* (1849) 1 Mac & G 294 at 298 per Lord Cottenham LC; and see *Chan v Zacharia* (1983) 154 CLR 178, Aust HC. See also **EQUITY** vol 16(2) (Reissue) PARAS 852-853.

2 *Clegg v Edmondson* (1857) 8 De GM & G 787; *Re Biss, Biss v Biss* [1903] 2 Ch 40 at 61, CA. See also **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 368 et seq (considerations specially affecting mining property).

3 *Featherstonhaugh v Fenwick* (1810) 17 Ves 298.

4 *Clements v Hall* (1858) 2 De G & J 173.

5 *Clements v Norris* (1878) 8 ChD 129, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(2) MANAGEMENT OF PARTNERSHIP AFFAIRS/110. Powers of individual partners and of majority.

(2) MANAGEMENT OF PARTNERSHIP AFFAIRS

110. Powers of individual partners and of majority.

Subject to any agreement express or implied between the partners, every partner may inspect the partnership books¹ and may take part in the management of the partnership business², and, subject to any such agreement, any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners³; but the majority must act in good faith and every partner must have the opportunity of being heard⁴.

A majority of partners cannot, however, change the nature of the partnership business; for this purpose, the consent of all the existing partners is required⁵. Nor, it seems, can a majority, when selling their own shares in the partnership, sell the shares of the dissentient partners⁶. A majority of partners cannot expel any partner, unless the power to do so has been conferred by express agreement between the partners⁷.

The diligence required of a partner may be limited by the partnership agreement to that part of the business which is conducted by him⁸.

The management and control of a group partnership present special difficulties⁹.

1 See the Partnership Act 1890 s 24(9); and PARA 136.

2 Partnership Act 1890 s 24(5). In *Donaldson v Williams* (1833) 1 Cr & M 345, it was held that one of two partners, joint tenants of a house where their joint business was carried on, had a right to authorise a joint weekly servant to remain in the house although the other partner had regularly given him a week's notice to leave. The exclusion of a partner from the management of the partnership business may be restrained by injunction: see PARA 167.

3 Partnership Act 1890 s 24(8). The admission of a pupil or apprentice with a view to training him in the knowledge of the business falls within 'ordinary matters connected with the partnership business': *Highley v Walker* (1910) 26 TLR 685.

4 'I call that the act of all, which is the act of the majority, provided all are consulted and the majority are acting bona fide, meeting, not for the purpose of negating what any one may have to offer, but for the purpose of negating what, when they are met together, they may, after due consideration, think proper to negative': *Const v Harris* (1824) Turn & R 496 at 525 per Lord Eldon LC. If there is any agreement by the majority, before hearing the minority, to override in any event the views of the minority, such conduct is not consistent with good faith: *Great Western Rly Co v Rushout* (1852) 5 De G & Sm 290 at 310. The minority must not, however, be merely obstructive, and may, after reasonable discussion, be overruled: see *Wall v London and Northern Assets Corp* [1898] 2 Ch 469, CA.

5 Partnership Act 1890 s 24(8); *Natusch v Irving* (1824) 2 Coop temp Cott 358; *A-G v Great Northern Rly Co* (1860) 1 Drew & Sm 154; and see PARA 47. What are the limits of deviation which will justify the court's interference on behalf of a dissentient minority depends upon the circumstances of each case, and the right to relief may be lost through laches or acquiescence: *Gregory v Patchett* (1864) 33 Beav 595.

6 *Chapple v Cadell* (1822) Jac 537.

7 Partnership Act 1890 s 25. As to expulsion see PARA 179.

8 *Smith v Mules* (1852) 9 Hare 556.

9 See *Nixon v Wood* [1987] 2 EGLR 26, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(2) MANAGEMENT OF PARTNERSHIP AFFAIRS/111. Remuneration for management.

111. Remuneration for management.

A managing partner, like any other partner, is not entitled to remuneration for acting in the partnership business unless there is an express or implied agreement to that effect¹. An exception to this rule is where an express (or perhaps an implied) obligation is, by virtue of a firm's partnership agreement, imposed upon partners to devote their whole time and attention to the firm's affairs and one or more partners in breach of this obligation wilfully leaves his or their co-partners to carry on the business unaided².

After dissolution, however, a partner carrying on the firm's business in its winding up may be entitled to remuneration notwithstanding the absence of any express or implied agreement therefor³. Thus, a surviving partner who carries on the business profitably, retaining the capital of his deceased partner, is entitled to just allowances for management⁴ unless he is himself the executor of the deceased partner⁵; and, where one partner is suffering from a mental disorder, his co-partners may be entitled to remuneration for managing the firm's business in its winding up⁶.

1 Partnership Act 1890 s 24(6); *Thornton v Proctor* (1792) 1 Anst 94; *Holmes v Higgins* (1822) 1 B & C 74 (partner did work as a surveyor); *Hutcheson v Smith* (1842) 5 I Eq R 117; *Robinson v Anderson* (1855) 20 Beav 98 at 103, 104 (affd 7 De GM & G 239). Cf *Whittle v M'Farlane* (1830) 1 Knapp 311 (remuneration for the collection of book debts due to a preceding partnership not allowed); *Turnock v Taylor* (1961) 180 Estates Gazette 773, CA. As to the meaning of 'salaried partner' see PARA 18. Where, however, the person managing the partnership business is not a partner but a creditor of the partnership to whom the partners may have assigned the partnership assets as security for the partnership debt due to him, that person may not claim remuneration for his (largely unsuccessful) management notwithstanding the fact that the partners have acquiesced in and agreed to his being paid remuneration, where the partners' agreement and acquiescence have been made under pressure: *Barrett v Hartley* (1866) 14 WR 684. Even where there is express agreement that a particular partner will be allowed remuneration for acting in the partnership business, such agreement may not survive the firm's dissolution: *Tibbits v Phillips* (1853) 10 Hare 355 (managing partner held not to be entitled to such remuneration whilst acting in the winding up of the partnership after its dissolution).

2 *Airey v Borham* (1861) 29 Beav 620 (partner complying with his obligation held entitled to just allowances for his efforts); cf *Webster v Bray* (1849) 7 Hare 159 (inequality of labour contemplated from the beginning so that there was no express or implied obligation to devote full time and attention to the firm's affairs). As to the rule that profits must be shared equally unless agreed otherwise see, however, PARA 129.

3 See *Harris v Sleep* [1897] 2 Ch 80, CA (one partner who was appointed receiver and manager without remuneration of the firm's affairs after its dissolution held entitled to wages for work done by him which proved beneficial to the business, even though such work formed no part of his duties qua receiver and manager); cf *Tibbits v Phillips* (1853) 10 Hare 355. As to the continuation of partners' authority after dissolution see PARA 198.

4 *Brown v De Tastet* (1819) Jac 284; *Re Aldridge*, *Aldridge v Aldridge* [1894] 2 Ch 97; *Featherstonhaugh v Turner* (1858) 25 Beav 382; *Crawshay v Collins* (1826) 2 Russ 325; and see PARA 201 note 5.

5 *Burden v Burden* (1813) 1 Ves & B 170; *Stocken v Dawson* (1843) 6 Beav 371.

6 *Mellersh v Keen* (1859) 27 Beav 236.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(3) ADMISSION OF OTHER PARTNERS/112. New partner admitted only by consent of all.

(3) ADMISSION OF OTHER PARTNERS

112. New partner admitted only by consent of all.

Subject to any agreement express or implied between the partners, no person may be introduced as a partner without the consent of all existing partners¹. The terms on which he is admitted are, therefore, usually determined by express agreement. An attempt by one partner to introduce a new partner without consent amounts only to an assignment of part of his share in the partnership². It may create a sub-partnership between the newcomer and the person who introduced him, but it does not confer upon the newcomer the rights of a partner as against the original firm³ unless the person who introduced him has implied authority to make his partners co-partners with another person⁴.

1 Partnership Act 1890 s 24(7). This is a fundamental principle of partnership law: see *Crawshay v Maule* (1818) 1 Swan 495 at 509n et seq; cf *Lovegrove v Nelson* (1834) 3 My & K 1 at 20. According to the fundamental principles of partnership law the admission (or retirement) of a partner will technically cause the dissolution of the old firm and the constitution of a new firm: see PARAS 44, 179, 205.

2 *Re Slyth, ex p Barrow* (1815) 2 Rose 252 at 255; *Bray v Fromont* (1821) 6 Madd 5.

3 As to the rights of an assignee see PARA 126. As to those of the assignee of a limited partner see PARA 229. As to the duration of a sub-partnership see PARA 43.

4 *Mann v D'Arcy* [1968] 2 All ER 172, [1968] 1 WLR 893; and see PARA 47.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(3) ADMISSION OF OTHER PARTNERS/113. Discrimination.

113. Discrimination.

It is unlawful for a firm¹, in relation to a position as partner in the firm, to discriminate against any person²:

- 21 (1) in the arrangements they make for determining to whom they should offer that position; or
 - 22 (2) in the terms on which they offer him or her that position; or
 - 23 (3) by refusing or deliberately not offering him or her the position; or
 - 24 (4) in a case where the person already holds that position:
- 1
- 1. (a) in the way they afford him or her access to any benefits or by refusing to afford or deliberately not affording him or her access to them;
 - 2. (b) by expelling him or her from that position or subjecting him or her to any other detriment,
- 2

on the grounds of gender³, race, ethnic or national origin⁴, disability⁵, religion or belief⁶, age⁷ or sexual orientation⁸.

1 The restriction in the Race Relations Act 1976 s 10(1) to firms consisting of six or more partners does not apply in relation to discrimination on grounds of race, ethnic or national origins: s 10(1A) (added by SI 2003/1626).

2 The Sex Discrimination Act 1975 s 1, and the provisions of Pt II (ss 6-21) and Pt III (ss 22-36) relating to sex discrimination against women, apply equally to the treatment of men: s 2(1).

3 See the Sex Discrimination Act 1975 s 11; and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 366.

4 See the Race Relations Act 1976 s 10; and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 450.

5 See the Disability Discrimination Act 1995 ss 6A-6C; and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 545.

6 See the Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, reg 14; and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 669.

7 See the Employment Equality (Age) Regulations 2006, SI 2006/1031, reg 17; and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 775.

8 See the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, reg 14; and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 731.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(3) ADMISSION OF OTHER PARTNERS/114. Power to nominate a partner.

114. Power to nominate a partner.

If a partnership agreement permits a partner to nominate his successor on his death or retirement¹, the firm comes under an obligation to admit the nominee as a partner², but cannot compel him to become a partner³. Even if one partner has covenanted with another that his nominee is to become a partner with the other, the court will not specifically enforce the covenant against the nominee; and, if no provision has been made for the event of his refusal to become a partner, the partnership will be declared dissolved, but without prejudice to any right of action which the covenantee may have against the covenantor or his estate for breach of the covenant⁴.

1 The inclusion in a partnership agreement of such a power is now rare.

2 *Byrne v Reid* [1902] 2 Ch 735, CA. As to the remedies of a rejected nominee see *M'Neill v Reid* (1832) 9 Bing 68 (damages); *Byrne v Reid* (rejected nominee held to be entitled to such relief as the courts of equity were in the habit of granting as between partners), distinguished in *Re Franklin and Swathling's Arbitration* [1929] 1 Ch 238 (rejected nominee held to have no right to require a reference, as he was no party to the submission to arbitration under the partnership agreement). Executors having a duty to nominate certain persons as partners, with power to exclude one of them, have the right to exclude him if, without fraud, they unite in doing so: *Wainwright v Waterman* (1791) 1 Ves 311. Where, however, a partnership agreement gave a partner the power, by will or otherwise, to nominate a successor, the bequest to his widow of his entire estate did not constitute such a nomination: *Thomson v Thomson* 1962 SLT 109, HL.

3 *Madgwick v Wimple* (1843) 6 Beav 495.

4 *Downs v Collins* (1848) 6 Hare 418; *Lancaster v Allsup* (1887) 57 LT 53; and see *Kershaw v Matthews* (1826) 2 Russ 62.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(3) ADMISSION OF OTHER PARTNERS/115. Conditions of entry must be complied with.

115. Conditions of entry must be complied with.

A person who has an option to enter a partnership must comply strictly with the conditions of the option¹. He must make his election within the time fixed², and, if no time is fixed, the option is lost unless it is exercised within a reasonable time³. Before making his election, he is entitled to have a reasonable time for inspecting the affairs of the partnership, but not to have the accounts formally taken⁴. Before his option is exercisable, he cannot prevent the partnership being dissolved by the mutual consent of the partners⁵. Although the effect of the agreement between the partners may be to create a trust of the share in favour of the nominee⁶, it is not an immediate trust, but one to arise at a future time, at any rate when the nominee's right is contingent, and will attach only upon the then existing assets⁷.

An incoming partner is subject to the terms of the partnership, except as varied by express agreement, although he may not be bound by a special term of which he had no notice⁸.

1 See *Brooke v Garrod* (1857) 3 K & J 608; *Watney v Trist* (1876) 45 LJ Ch 412. A power to introduce two sons as pupils or clerks, with the option of becoming partners, does not extend to the introduction of a third son as pupil or clerk to succeed a son who has died without becoming a partner: *Watney v Trist* (1876) 45 LJ Ch 412 (where there was a provision restricting the employment of clerks and servants).

2 *Holland v King* (1848) 6 CB 727. During that period surviving partners must not do any act prejudicial to the value of the business, which, in the event of the option being declined, may be directed to be sold: *Evans v Hughes* (1854) 18 Jur 691 (changing the firm style).

3 *Vansittart v Osborne* (1871) 20 WR 195.

4 *Pigott v Bagley* (1825) M'Cle & Yo 569, Ex Ch.

5 *Ehrmann v Ehrmann* (1894) 72 LT 17. When, however, a person assigns his business to three persons as partners, on the terms that there shall be reserved a share of the profits for his nominee, who is to have the option of being admitted a partner on attaining his majority, the partnership cannot be prematurely dissolved without that person's consent: *Allhusen v Borries* (1867) 15 WR 739.

6 *Page v Cox* (1852) 10 Hare 163.

7 *Ehrmann v Ehrmann* (1894) 72 LT 17, questioning the observations in *Re Flavell*, *Murray v Flavell* (1883) 25 ChD 89 at 102 per Cotton LJ.

8 *Austen v Boys* (1857) 24 Beav 598 at 606; affd (1858) 2 De G & J 626.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(4) PARTNERSHIP PROPERTY AND PROPERTY OF SEPARATE PARTNERS/116. Partnership property.

(4) PARTNERSHIP PROPERTY AND PROPERTY OF SEPARATE PARTNERS

116. Partnership property.

All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise¹, on account of the firm, or for the purposes and in the course of the partnership business, must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement². Bank drafts obtained by a partner in excess of his authority do not, however, become partnership property³.

A partner may be guilty of theft of partnership property⁴, and, if he treats it in a manner which can only be justified by the right to exclusive possession, he may be liable in tort for conversion⁵.

1 See *Waterer v Waterer* (1873) LR 15 Eq 402. Property given to some only of the partners to replace lost partnership property is not included: *Campbell v Mullett* (1819) 2 Swan 551. As to trust money used by the firm in breach of trust see PARA 204.

As to the difficulty which may be encountered in trying to ascertain which assets are partnership property see *Barton v Morris* [1985] 2 All ER 1032, [1985] 1 WLR 1257, where it was held that the asset in question (a guest house) was not a partnership asset, but was held by the partners as joint tenants, notwithstanding that the guest house was shown in the partnership accounts as a partnership asset. The crucial question was what was intended by the partners. In that case, the fact that the guest house was shown in the accounts was explicable for another reason, namely, the plaintiff's desire to put everything in the accounts 'for the sake of completeness'. Similarly, where an asset is held on a sham lease by one of the parties to a joint venture agreement, that lease will be held to belong to the joint venture and not to the 'tenant' personally, where this is the true intention of the parties: *Rowan v Dann* (1991) 64 P & CR 202, CA. In *Miles v Clarke* [1953] 1 All ER 779, [1953] 1 WLR 537 (a photographers' partnership), Harman J was prepared to conclude that no terms as to which assets constituted partnership property (as opposed to partners' separate property) were to be implied save those required to give business efficacy to the arrangement. As a result, only those consumable items which constituted stock-in-trade (photographic film) were held to be partnership assets; the lease of the premises from which the firm carried on in business (which was in the defendant's name only) and the goodwill which the plaintiff had brought into the business remained each partner's respective separate property. As to which assets will not constitute property for the purposes of a partner's lien under the Partnership Act 1890 s 39 (see PARA 206) see *Faulks v Faulks* [1992] 1 EGLR 9 (milk quota which had been registered in the name of the partnership). See also *Browell v Goodyear* (2000) Times, 24 October (the way to estimate the value of work undertaken on a 'no win, no fee' basis in progress at the dissolution date of a firm of solicitors was to establish what proportion of a particular class of work was likely to be completed successfully in due course, then to establish what percentage of that work had already been completed by the firm at the date of dissolution); not following *Robertson v Brent and Haggitt* [1972] NZLR 406, NZ SC (work in progress in a solicitors' firm held not to be an asset).

2 Partnership Act 1890 s 20(1). See *Don King Productions Inc v Warren* [2000] Ch 291, [1999] 2 All ER 218, CA (partnership property within the Partnership Act 1890 s 20 included that to which a partner was entitled and which all the partners expressly or by implication agreed should, as between themselves, be treated as partnership property. It was immaterial, as between the partners, whether it could be assigned by the partner in whose name it stood to the partners jointly). See also *Strover v Strover* [2005] EWHC 860 (Ch), (2005) Times, 30 May (life assurance policy monies which continued to be paid by partner after retirement were held to be assets of the original partnership). Furthermore, it would appear that, once an asset is bought for a firm and forms part of its assets, any extras which are subsequently purchased for that asset may also constitute partnership assets: *Broadhead Peel & Co v Customs and Excise Comrs* [1984] VATTR 195 (Land Rover and sun-roof).

3 *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1, [1960] 3 All ER 482, PC.

4 *R v Bonner* [1970] 2 All ER 97n, [1970] 1 WLR 838, CA; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 289. For remarks on the earlier law see *R v Jesse Smith* (1870) LR 1 CCR 266 at 269 per Bovill CJ.

5 *Baker v Barclays Bank Ltd* [1955] 2 All ER 571 at 576, [1955] 1 WLR 822 at 827 per Devlin J; and see *Farrar v Beswick* (1836) 1 Mood & R 527; *Wilkinson v Haygarth* (1846) 12 QB 837 (on appeal (1848) 12 QB 851, Ex Ch); *Morgan v Marquis* (1853) 9 Exch 145; *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1, [1960] 3 All ER 482, PC. See **TORT** vol 45(2) (Reissue) PARAS 542-545.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(4) PARTNERSHIP PROPERTY AND PROPERTY OF SEPARATE PARTNERS/117. Presumption as to property purchased with partnership funds.

117. Presumption as to property purchased with partnership funds.

Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm¹. The mere fact that the business is conducted on property belonging to one partner does not necessarily make it partnership property². If, however, the property has been purchased out of partnership assets and held as part of the partnership stock, it is immaterial that it has not actually been used for carrying on the partnership business upon it or by means of it³. Thus, where the transaction is in substance the purchase of a mixed property, for example a farm and the stock as a going concern⁴, or a nursery-ground and the business carried on upon it⁵, the property so acquired is partnership property⁶.

1 Partnership Act 1890 s 21; *Tibbets v Phillips* (1853) 10 Hare 355; *Helmore v Smith (1)* (1887) 35 ChD 436, CA; *Wray v Wray* [1905] 2 Ch 349. It is immaterial that the purchase is made in the name of one partner only, if it is clear that he is not to hold it for himself alone: *Morris v Barrett* (1829) 3 Y & J 384. See *Broadhead Peel & Co v Customs and Excise Comrs* [1984] VATTR 195; and PARA 116. If property was partnership property, then there is a strong presumption that the right of survivorship is not intended to apply; but partners might nevertheless agree to vary the normal rule of partnership property in favour of their own autonomous consent to their being beneficial joint tenants with the standard consequences of that arrangement: *Bathurst v Scarborough* [2004] EWCA Civ 411, [2004] All ER (D) 19 (Apr) (clear evidence that house was purchased by partners as joint tenants in full knowledge of the consequences; one partner subsequently died; right of survivorship applied).

2 *Davis v Davis* [1894] 1 Ch 393 at 401. Where the property upon which the business is carried on is, and is declared by the partnership agreement to be, the property of one partner, and the agreement contains no provision as to the tenancy of the partnership, but only a general direction that 'all rent' is to be paid out of yearly profits, the court infers that the partnership was intended to hold the property on a tenancy during the continuance of the partnership, and not on a tenancy from year to year or at will: *Pocock v Carter* [1912] 1 Ch 663. Cf *Lee v Crawford* (1912) 46 ILT 81; and see PARAS 174 note 2, 176 note 1.

3 *Murtagh v Costello* (1881) 7 LR Ir 428. 'If the property purchased is substantially involved in the partnership business, it is to be held as purchased for partnership purposes': *Murtagh v Costello* at 436.

4 *Davies v Games* (1879) 12 ChD 813.

5 *Waterer v Waterer* (1873) LR 15 Eq 402.

6 See further PARA 118 note 5.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(4) PARTNERSHIP PROPERTY AND PROPERTY OF SEPARATE PARTNERS/118. Partnership land and tenancies.

118. Partnership land and tenancies.

Partners cannot grant a lease to themselves alone in circumstances where to do so would create a complete identity between the landlord and the tenants of the land in question¹; but, where some partners are and some are not the owners of the land in question, the owning partners may grant a lease to themselves and the other, non-owning, partners², provided that the lease is in writing and complies with all the relevant statutory requirements. Where no such lease has been effected, merely a non-exclusive licence to occupy the premises from which the firm effects business will be inferred in favour of the non-owning partners³.

If partners own land as co-owners, it may be partnership property or not⁴; and they may be partners in the profits derived from its use, even though the land itself or their estate or interest in it is not partnership property⁵. Where such partners purchase out of their profits other land to be used in like manner, the land purchased belongs to them, in the absence of an agreement to the contrary, not as partners but as co-owners for the same respective estates and interests as are held by them in the original land at the date of the purchase⁶.

A firm will not obtain relief from forfeiture of its lease merely because one of its partners is the landlord⁷.

Where a business tenancy is held jointly by business and non-business tenants, the business tenants alone may apply to the court for a new tenancy under the Landlord and Tenant Act 1954⁸.

1 *Rye v Rye* [1962] AC 496, [1962] 1 All ER 146, HL.

2 See eg *Parsons v Parsons* (1983) 127 Sol Jo 823; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA (parties had entered into a lease of a farm and subsequently became partners); *Gray (surviving executor of Lady Fox deceased) v IRC* [1994] STC 360, CA; *Dickson v MacGregor* 1992 SLT 83. The purchase of a business and its goodwill does not of itself confer on the purchaser any right of occupation of the premises from which the business was previously effected: *Vandersteen v Agius* [1992] NPC 108, CA.

3 *Harrison-Broadley v Smith* [1964] 1 All ER 867, [1964] 1 WLR 456, CA (decided under the Agricultural Holdings Act 1948 s 2(1) (repealed): see now the Agricultural Holdings Act 1986 s 2(1); and **AGRICULTURAL LAND** vol 1 (2008) PARA 327).

4 See PARAS 116-117. As to co-owners of partnership property see PARA 11. As to the conveyancing considerations on a sale to a firm see PARA 119 note 3.

5 See *Crawshay v Maule* (1818) 1 Swan 495 at 518, 523 per Lord Eldon LC. When land is bought by partners in trade for partnership purposes and paid for out of partnership assets, the presumption that it is partnership land becomes practically conclusive: *Re Laurence, ex p M'Kenna, Bank of England Case* (1861) 3 De GF & J 645 at 659 per Turner LJ. See also *Smith v Smith* (1800) 5 Ves 189; cf *Jardine-Paterson v Fraser* 1974 SLT 93. Payment of the rent by a firm is not conclusive that the lease is the firm's: *Hodson v Cashmore* (1972) 226 Estates Gazette 1203. As to co-owners of land who are not partners see PARA 11. As to the rule that partnership land is to be sold on dissolution see PARA 208.

6 Partnership Act 1890 s 20(3); *Steward v Blakeway* (1869) 4 Ch App 603 (affg (1868) LR 6 Eq 479); *Davies v Games* (1879) 12 ChD 813. See also *Christie v Christie* [1917] 1 IR 17 (land bought out of profits derived in part only from partnership property). 'It is not the law that partners in business who are owners of the property by means of which the business is carried on are necessarily partners as regards that property': *Davis v Davis* [1894] 1 Ch 393 at 401 per North J. However, in *Morris v Barrett* (1829) 3 Y & J 384, although the original land was not partnership property, land afterwards bought and paid for out of profits was, in the circumstances, held to be partnership property. If co-owners of business property agree that the property is to be partnership assets, and the trade is carried on there, the mortgagee of the interest of one of the partners is put upon

inquiry with regard to the agreement between them when he is aware that the property is used for partnership purposes: *Cavander v Bulteel* (1873) 9 Ch App 79 (mortgagee postponed to the lien of the other partner for the excess share of debts discharged by the other partner although incurred after the date of the mortgage).

7 *Brenner v Rose* [1973] 2 All ER 535, [1973] 1 WLR 443; and see **RECEIVERS** vol 39(2) (Reissue) PARA 390. Where, however, a partner serves a notice to quit in his capacity as landlord, he is not entitled to refuse to consent to service of a counter-notice where he is under a duty as trustee to preserve partnership property: *Sykes v Land* (1984) 271 Estates Gazette 1264, CA.

8 See the Landlord and Tenant Act 1954 s 41A(5); and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 765. As to applications for new tenancies see s 24(1); and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 713.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(4) PARTNERSHIP PROPERTY AND PROPERTY OF SEPARATE PARTNERS/119. Effect of co-ownership.

119. Effect of co-ownership.

Equity recognises no right of survivorship as regards partnership property¹. Where a legal estate in land is vested in partners as part of their partnership property², it is held by them as joint tenants³. The legal estate in the land is accordingly subject to the rights of survivorship which are incident to a joint tenancy⁴, but the beneficial interest in the partnership property is held exclusively for the purpose of the partnership and in accordance with the partnership agreement⁵. The estate of a deceased partner is entitled, not specifically, but in value, to a share of the chattels used for the purposes of the business⁶, and, on his death, the value of his share is regarded as the price to be paid by the continuing firm⁷.

To effect a sale of land held by the partnership, the partners must observe trustees' duties of consultation⁸.

1 This has been expressed by the maxim *jus accrescendi inter mercatores locum non habet* (the right of survivorship does not apply among businessmen): see *Co Litt* 182a; 2 Bl Com (14th Edn) 185. See, however, *Reilly v Walsh* (1848) 11 I Eq R 22; and *Buckley v Barber* (1851) 6 Exch 164, although this case has been disapproved. In *Bathurst v Scarborough* [2004] EWCA Civ 411, [2004] All ER (D) 19 (Apr) there was clear evidence that a house was purchased by partners as joint tenants in full knowledge of the consequences, and when one partner subsequently died the right of survivorship applied.

2 Land may be vested at law in one partner only and also be partnership property: see *Re Rayleigh Weir Stadium* [1954] 2 All ER 283, [1954] 1 WLR 786. In such a case, the other partner has, it seems, an equitable right to his share and thus a right to have a share of the proceeds of sale of the land: see *Re Rayleigh Weir Stadium* at 286 and at 791.

3 *Re Fuller's Contract* [1933] Ch 652 (where it was decided that the transitional provisions contained in the Law of Property Act 1925 s 39(4), Sch 1 Pt IV applied to land conveyed to partners as joint tenants 'as part of their co-partnership estate'); followed in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, Aust HC; but see *Gray (surviving executor of Lady Fox deceased) v IRC* [1994] STC 360, CA (notwithstanding the equitable doctrine of conversion, Lady Fox's freehold estate in a farm could be valued, together with her interest in the partnership which held a tenancy of the farm, as a 'single unit' of property for capital gains tax purposes); and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 616 et seq. See further the Law of Property Act 1925 ss 34(1), 36; and **REAL PROPERTY** vol 39(2) (Reissue) PARAS 198, 207, 211. Before 1 January 1926 a surviving partner with the legal estate vested in him (see the Partnership Act 1890 s 20(2)) could sell and convey the partnership property alone: *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427, CA. Today, any trust of property which consists of or includes land is held as a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 s 1; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 66. In the case of every trust for sale of land created by a disposition there is to be implied (despite any provision to the contrary made by the disposition) a power for the trustees to postpone sale of the land; and the trustees are not liable in any way for postponing sale of the land, in the exercise of their discretion, for an indefinite period: see s 4; and **SETTLEMENTS** vol 42 (Reissue) PARA 903.

4 Partnership Act 1890 s 20(2); and see **REAL PROPERTY** vol 39(2) (Reissue) PARA 195.

5 Partnership Act 1890 s 20(1). Accordingly the undivided property of a deceased or retiring partner must not be continued in the business without an express or implied agreement: *Crawshay v Collins* (1808) 15 Ves 218.

6 *Stuart v Marquis of Bute* (1806) 11 Ves 657 at 665; *Bligh v Brent* (1837) 2 Y & C Ex 268; *Ashworth v Munn* (1880) 15 ChD 363 at 369, CA.

7 *Ewing v Ewing* (1882) 8 App Cas 822, HL.

8 If a disposition creating a trust of land requires the consent of more than two persons to the exercise by the trustees of any function relating to the land, the consent of any two of them to the exercise of the function

is sufficient in favour of a purchaser: see the Trusts of Land and Appointment of Trustees Act 1996 s 10. As to consultation with beneficiaries see s 11. See further **TRUSTS** vol 48 (2007 Reissue) PARA 1036.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(4) PARTNERSHIP PROPERTY AND PROPERTY OF SEPARATE PARTNERS/120. Partnership property transferred to partner.

120. Partnership property transferred to partner.

Partners may transfer partnership property to one of themselves or to a limited company of which the partners are shareholders¹, and such a transfer is valid against the firm's creditors², if it is done in good faith³ and if it has been completed; but, if the agreement remains executory, the property remains joint⁴.

Similarly, if the personal representatives of a deceased partner sell his share to the surviving partner or partners, relying simply on a covenant of indemnity against the partnership debts, or if, on the true construction of the partnership agreement, they lose their right against the surviving partner or partners to have the partnership assets applied to the payment of the partnership liabilities, the joint property becomes the separate property of the surviving partner or partners⁵.

¹ See *Gordon v IRC* 1991 SLT 730.

² *Bolton v Puller* (1796) 1 Bos & P 539; *Ex p Ruffin* (1801) 6 Ves 119; *Re Henderson and Morley, ex p Freeman* (1819) Buck 471. As to the effect of the assignment of a lease see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 482. As to partnership leases see PARA 118. As to the distinction between the joint and the separate estate see further **BANKRUPTCY AND INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1242.

³ See *Re Lightoller, ex p Peake* (1816) 1 Madd 346; *Re Walker, Re Hardy, ex p Walker* (1862) 4 De GF & J 509; cf *Re Edwards-Wood, ex p Mayou* (1865) 4 De GJ & Sm 664. As to transactions at an undervalue and preferences where an individual is adjudged bankrupt see **BANKRUPTCY AND INSOLVENCY** vol 3(2) (2002 Reissue) PARA 653 et seq. As to transactions at an undervalue and preferences where a partnership is wound up as an unregistered company see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 843 et seq. As to insolvent partnerships generally see PARAS 99, 233; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 817 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1166-1301.

⁴ 'The agreement need not be entirely completed, but nothing must remain to be done to make it operative' (*Pearce v Bulteel* [1916] 2 Ch 544 at 556 per Neville J), eg if payment is to be guaranteed by a surety and he refuses to join in the transfer (*Re Mallam, ex p Wheeler* (1817) Buck 25). In such circumstances notice of the partner's retirement in the London, Edinburgh or Belfast Gazette and in circulars to customers does not suffice to complete the transfer: *Re Mallam, ex p Wheeler*. See also *Re Johnston and Danson, ex p Cooper* (1840) 1 Mont D & De G 358; *Re Kemptner* (1869) LR 8 Eq 286; *Re Wright, ex p Wood* (1879) 10 ChD 554, CA; *Re Head, ex p Kemp* (1893) 10 Morr 76, DC. As to Gazette advertisements see PARA 196.

⁵ *Re Simpson* (1874) 9 Ch App 572; cf *Re Fox, Brunner v Fox* (1915) 49 ILT 224 (where it was held that the partnership assets retained their character as such, in a case where a provision in the partnership agreement that the assets should be purchased by the surviving partner was never effected owing to his death). If, however, the partnership agreement is merely intended to vest the partnership assets in the surviving partner subject to payment of the partnership debts, the assets which were joint assets at the death remain joint assets, available to the joint creditors (*Re White, ex p Morley* (1873) 8 Ch App 1026; followed in *Re White, ex p Dear* (1876) 1 ChD 514, CA; and *Re Mellor, ex p Manchester Bank* (1879) 12 ChD 917 (affd sub nom *Re Mellor, ex p Butcher* (1880) 13 ChD 465, CA)), and the executors having paid, or become liable for, the partnership debts are entitled to be indemnified out of such assets (*Re Daniel, ex p Powell* (1896) 75 LT 143). Cf *Re Head, ex p Kemp* (1893) 10 Morr 76, DC.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(4) PARTNERSHIP PROPERTY AND PROPERTY OF SEPARATE PARTNERS/121. Partner's property transferred to firm.

121. Partner's property transferred to firm.

The separate property of one or more partners may be converted into the joint property of the firm¹; but the mere fact that the partnership profits are made by means of the separate property of one partner does not convert that property into joint property².

1 *Re Bowers, ex p Owen* (1851) 4 De G & Sm 351 (where one partner, B, was separate owner of stock-in-trade and furniture, and it was inferred and held by the court that the stock-in-trade had become joint property, subject to an account in which the firm would be debited in favour of B with the value of articles which belonged to him or for which he had paid; a different inference was drawn as to the furniture which was held to have remained the separate property of B); *Miles v Clarke* [1953] 1 All ER 779, [1953] 1 WLR 537; cf *Re Fear and Coward, ex p Hare* (1835) 2 Mont & A 478 (where the furniture had been treated by the partners as joint property). As to the principle of these cases see *Re Ashley, ex p Murton* (1840) 1 Mont D & De G 252 at 261 per Sir George Rose. Where the owner of a mill and its machinery admitted two partners, and the value of the property was entered in the partnership books as the amount of his capital, and all additions and improvements during the partnership were made at the expense of the firm, the property was held to have become joint property: *Robinson v Ashton, Ashton v Robinson* (1875) LR 20 Eq 25. Cf *Hills v Parker* (1861) 7 Jur NS 833, HL, and *Pilling v Pilling* (1865) 3 De GJ & Sm 162. Thus, if a patent belonging solely to one partner is 'dedicated to the purposes of the partnership', it becomes joint property: *Kenny's Patent Button-Holeing Co Ltd v Somervell and Lutwyche* (1878) 38 LT 878. Even where an asset which is owned by the partners as their separate property is shown in the partnership accounts as being a partnership asset, this will not necessarily constitute evidence of an implied agreement to transfer the asset into the joint property of the firm: *Barton v Morris* [1985] 2 All ER 1032, [1985] 1 WLR 1257; and see PARA 116.

2 *Burdon v Barkus* (1862) 4 De GF & J 42, distinguishing *Jackson v Jackson* (1804) 9 Ves 591; *Fromont v Coupland* (1824) 2 Bing 170; *Smith v Watson* (1824) 2 B & C 401; and see *Pocock v Carter* [1912] 1 Ch 663. See also *Miles v Clarke* [1953] 1 All ER 779, [1953] 1 WLR 537; and PARAS 116-117.

Formerly, if the owner of a business held out to the world as a partner, a person who had in fact no interest in that business, and permitted him to act as such, and the two were jointly adjudicated bankrupts, the owner was estopped from saying that the assets of the business were not joint property (*Re Rowland and Crankshaw* (1866) 1 Ch App 421; *Re Pulsford, ex p Hayman* (1878) 8 ChD 11, CA); but, where the holding out was only to a very few creditors, and there was no holding out to the world, it might be that there was no partnership and consequently no joint property (*Re Wright, ex p Sheen* (1877) 6 ChD 235, CA; cf *Re Reay, ex p Arbouin and Allnutt, Re Reay, ex p Gonne* (1846) De G 359). The doctrine of reputed ownership has no application, however, under the Insolvency Act 1986. As to insolvent partnerships generally see PARAS 99, 233; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 817 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1166-1301.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(5) SHARES IN PARTNERSHIPS/(i) Nature and Amount of Shares/122. Partner's share in net assets only.

(5) SHARES IN PARTNERSHIPS

(i) Nature and Amount of Shares

122. Partner's share in net assets only.

A partner's share is his proportion of the joint assets after their realisation and conversion into money and after payment and discharge of the joint debts and liabilities¹. It follows that during the currency of a partnership each partner's share comprises a bundle of the different types of property right included within the assets of the firm, whether of land, personalty or choses (or things) in action, and is unascertained in value². The share includes sums advanced by any partner beyond his due proportion³, and, therefore, separate creditors of a partner may not be paid out of partnership assets until the claims of the other partners upon the partnership are satisfied⁴. After the death of one partner in a firm of two, the surviving partner may give a valid charge over partnership property by way of security for a debt incurred during the lifetime of the other⁵. A share of the assets, bequeathed to a surviving partner, is not thereby relieved from its liability for the joint debts⁶; but this principle cannot be taken so far as to invalidate a bequest of a partnership share if the partnership is solvent and the testator desires to bequeath partnership freeholds free of partnership debts⁷.

1 *Garbett v Veale* (1843) 5 QB 408. See also *Marshall v Maclure* (1885) 10 App Cas 325 at 334, PC. Joint debts are payable primarily out of joint assets if sufficient, even though secured by a charge on the separate property of one partner (*Re Ritson, Ritson v Ritson* [1898] 1 Ch 667; affd [1899] 1 Ch 128, CA), although one of the persons entitled to share in the assets, eg a partner who is a minor, may not be personally liable for the joint debts (*Lovell and Christmas v Beauchamp* [1894] AC 607, HL). See PARA 33; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 88-89; **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 424.

2 See *Hadlee v IRC* [1993] AC 524, [1993] 2 WLR 696, PC; *Re Ritson, Ritson v Ritson* [1899] 1 Ch 128; *Rodriguez v Speyer Bros* [1919] AC 59 at 68, HL, per Lord Finlay LC; *Burdett-Coutts v IRC* [1960] 3 All ER 153, [1960] 1 WLR 1027. A partner's beneficial share has been described as an equitable interest as opposed to a 'mere equity': *Canny Gabriel Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, Aust HC. As to the nature of a partner's share for inheritance tax purposes see *Gray (surviving executor of Lady Fox deceased) v IRC* [1994] STC 360, CA. As to the formalities required for the sale or other disposition of an interest in land, and as to whether such formalities are required in the case of a partnership comprising land as one of its assets, see PARA 39.

3 *West v Skip* (1749) 1 Ves Sen 239. See also the Partnership Act 1890 s 39; and PARAS 142, 206, 212. As to a partner's right to an indemnity and lien see PARA 138 et seq.

4 *Croft v Pyke* (1733) 3 P Wms 180; *West v Skip* (1749) 1 Ves Sen 239; *Holderness v Shackels* (1828) 8 B & C 612. Nor can money lent by a partner to his firm be recovered at common law without an action for an account: see PARAS 5, 11, 135, 158.

5 *Re Clough, Bradford Commercial Banking Co v Cure* (1885) 31 ChD 324; *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427 at 434, CA; and see PARAS 52, 199.

6 *Farquhar v Hadden* (1871) 7 Ch App 1.

7 *Re Holland, Brettell v Holland* [1907] 2 Ch 88.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(5) SHARES IN PARTNERSHIPS/(i) Nature and Amount of Shares/123. Separate property.

123. Separate property.

Partners may convert their joint property into the separate property of one or more of their number¹, but, to render an agreement for such partition complete, possession of the property must be delivered to the acquiring partner².

A partner may have the right to work a patent, even though he may not be entitled to a share in the patent itself³. Land or other assets which produce partnership profit may be separately owned⁴.

1 *Bolton v Puller* (1796) 1 Bos & P 539; and see PARA 120.

2 *Re Christopher, ex p Harris* (1816) 1 Madd 583.

3 *Kenny's Patent Button-Holeing Co Ltd v Somervell and Lutwyche* (1878) 38 LT 878.

4 As to partnership property see PARA 116; and as to land see PARA 118.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(5) SHARES IN PARTNERSHIPS/(i) Nature and Amount of Shares/124. Partners' shares prima facie equal.

124. Partners' shares prima facie equal.

Subject to any agreement express or implied between the partners, all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm¹. The rule of equality may be negatived by the terms of the contract or by the course of dealing².

1 See the Partnership Act 1890 s 24(1); and PARA 129.

2 See PARA 129. See also the Partnership Act 1890 s 19; and PARA 40.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(5) SHARES IN PARTNERSHIPS/(ii) Dealings by a Partner with his Share/125. Effect of assignment of partner's share.

(ii) Dealings by a Partner with his Share

125. Effect of assignment of partner's share.

An assignment by a partner of his partnership share entitles the assignee to limited rights only¹. Recognition by the other partners may, however, confer the rights of a partner on an assignee², and the terms of the partnership agreement may be such as to place the assignee in the position of the assignor³. A partner who has an unconditional right to transfer his share is relieved from liability by an actual assignment of which notice is given to the other partners, even if the assignee is insolvent⁴.

1 See the Partnership Act 1890 s 31(1); *Bray v Fromont* (1821) 6 Madd 5; and PARA 126. As to the effect of a partner's attempt to assign part of his profit share to his family in order to reduce his income tax liability where the partner continued to act for the firm see *Hadlee v IRC* [1993] AC 524, [1993] 2 WLR 696, PC (where the unrealisable nature of a partner's share during the currency of the partnership was emphasised). As to attempts to reduce liability to value added tax see *Fengate Developments (a partnership) v Customs and Excise Comrs* [2004] EWCA Civ 1591, [2005] STC 191.

2 *Jefferys v Smith* (1827) 3 Russ 158.

3 *Fox v Clifton* (1832) 9 Bing 115; *Pinkett v Wright* (1842) 2 Hare 120 (affd sub nom *Murray v Pinkett* (1846) 12 Cl & Fin 764, HL); *Re Pennant and Craigwen Consolidated Lead Mining Co, Mayhew's Case* (1854) 5 De GM & G 837. As to the case of a limited partnership see PARA 229.

4 *Jefferys v Smith* (1827) 3 Russ 158. The right of an equitable mortgagee of partnership property is not varied by a subsequent dissolution of partnership between the mortgagors and the bankruptcy of the continuing partner, even though there has been a substitution of a separate collateral security for a joint collateral security given before the dissolution: *Re Draper, ex p Booth* (1832) 1 LJ Bcy 81.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(5) SHARES IN PARTNERSHIPS/(ii) Dealings by a Partner with his Share/126. Limited rights of assignee.

126. Limited rights of assignee.

An assignment by any partner of his share in the partnership, whether absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs¹, or to require any accounts of the partnership transactions, or to inspect the partnership books², but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled³, and the assignee must accept the account of profits agreed to by the partners⁴. He may not be a necessary party to a partnership claim⁵. He takes subject to the rights of the other partners, and is affected by equities arising between the assignor and his partners after the date of the assignment⁶. A purchaser of a share must indemnify his vendor against the partnership liabilities⁷.

An assignee or mortgagee is, however, entitled on dissolution of the partnership, whether as respects all the partners or as respects his assignor, to receive the share of the partnership assets to which his assignor is entitled as between himself and the other partners and to call for an account as from the date of the dissolution for the purpose of ascertaining that share⁸, and, where the assignor's co-partners have notice of the assignment, the assignee is not affected by any agreement or dealing between the partners with regard to the assigned share subsequent to such assignment⁹; and a mortgagee of shares in a mining partnership is entitled to foreclosure¹⁰.

1 An agreement in good faith for payment of salaries to partners has been held to be binding on assignees as part of 'management and administration': *Re Garwood's Trusts, Garwood v Paynter* [1903] 1 Ch 236.

2 Partnership Act 1890 s 31(1); *Bergmann v Macmillan* (1881) 17 ChD 423. As to the partnership books see PARAS 110, 136.

3 Partnership Act 1890 s 31(1); *Glyn v Hood* (1859) 1 Giff 328 (affd (1860) 1 De GF & J 334); *Cavander v Bulteel* (1873) 9 Ch App 79.

4 Partnership Act 1890 s 31(1).

5 See PARA 146.

6 *Smith v Parkes* (1852) 16 Beav 115; *Kelly v Hutton* (1868) 3 Ch App 703; *Cavander v Bulteel* (1873) 9 Ch App 79; *Dodson v Downey* [1901] 2 Ch 620.

7 *Dodson v Downey* [1901] 2 Ch 620; and see *Mills v United Counties Bank Ltd* [1912] 1 Ch 231, CA.

8 Partnership Act 1890 s 31(2); *Watts v Driscoll* [1901] 1 Ch 294, CA. If, however, there has been no dissolution, the account will be taken from the date of issue of the writ in an action by the mortgagee to realise his security: see *Whetham v Davey* (1885) 30 ChD 574. In a claim by an assignee for an account after dissolution, the assigning partner is a necessary party, since his obligation to account to his co-partners is not one which can be assigned: *Public Trustee v Elder* [1926] Ch 266; affd [1926] Ch 776, CA.

9 *Watts v Driscoll* [1901] 1 Ch 294, CA; and see *Re Garwood's Trusts, Garwood v Paynter* [1903] 1 Ch 236.

10 *Redmayne v Forster* (1866) LR 2 Eq 467.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(5) SHARES IN PARTNERSHIPS/(ii) Dealings by a Partner with his Share/127. Partner's right of pre-emption.

127. Partner's right of pre-emption.

A continuing partner's right of pre-emption given by the partnership contract is recognised by the court as a right of great value and importance, and is enforceable, in proper cases, by injunction or specific performance¹. The right may lapse if not exercised with due diligence on notice².

1 *Homfray v Fothergill* (1866) LR 1 Eq 567; and see *Stewart v Stuart* (1823) 1 LJOS Ch 61. As to enforcement by way of injunction and specific performance generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq; **SPECIFIC PERFORMANCE**.

2 *Rowlands v Evans, Williams v Rowlands* (1861) 30 Beav 302. The same applies if the offer cannot be made as provided by the partnership agreement: *Chapple v Cadell* (1822) Jac 537.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(5) SHARES IN PARTNERSHIPS/(ii) Dealings by a Partner with his Share/128. Assignment of share to a partner.

128. Assignment of share to a partner.

An assignment of his interest by one partner to another, where there are only two partners, operates as a dissolution¹, but probably not where there are more than two². Known insolvency of the concern does not vitiate the sale of his share by one partner to the other if no fraud is intended³.

One of several partners may purchase the share of another for his own benefit, and not for the benefit of the firm⁴. Where, at the instance of a partner's judgment creditor, that partner's share is ordered to be sold, the purchase of the share by the judgment debtor's co-partners will be set aside if there is any unfairness in their conduct in respect of the sale⁵.

1 *Heath v Sansom* (1832) 4 B & Ad 172. As to dissolution of the partnership see further PARA 174 et seq.

2 Ie having regard to the Partnership Act 1890 s 31 (see PARA 126): see *Emanuel v Symon* [1907] 1 KB 235 at 241-242 per Channell J; *Sturgeon Bros v Salmon* (1906) 22 TLR 584. Such an assignment is at all events a circumstance which the court may consider in determining whether to decree a dissolution.

3 *Re Lightoller, ex p Peake* (1816) 1 Madd 346. As to the rights of a partner whose share has been seized by a sheriff and sold see PARA 135 note 1. As to transactions at an undervalue and preferences where an individual is adjudged bankrupt see **BANKRUPTCY AND INSOLVENCY** vol 3(2) (2002 Reissue) PARA 653 et seq; as to transactions at an undervalue and preferences where a partnership is wound up as an unregistered company see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 843 et seq. As to insolvent partnerships generally see PARAS 99, 232; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 817 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1166-1301.

4 *Cassels v Stewart* (1881) 6 App Cas 64, HL.

5 *Perens v Johnson, Johnson v Perens* (1857) 3 Sm & G 419.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(6) DIVISION OF PROFITS AND INCIDENCE OF LOSSES/129. Partners' rights to equal shares.

(6) DIVISION OF PROFITS AND INCIDENCE OF LOSSES

129. Partners' rights to equal shares.

Subject to any agreement express or implied between the partners, all the partners are entitled to share equally in the capital and profits¹ of the business². This presumption may be negated either by express agreement³ or by implication, which may arise from the course of dealing by the partners⁴, although the burden of proof is on the partner who alleges inequality⁵. In order to rebut the presumption of equality, a partner seeking to alter the distribution of profits must detail the changes to the other partners, who must contractually accept the unequal distribution⁶. Even where one partner does much more work than another, the rule of equality applies in the absence of any previous arrangement between the partners⁷.

All the partners are entitled to share in the profits made by any one or more of them from transactions arising out of the business⁸, but the salary received by a partner in respect of an official position held by him is not *prima facie* to be treated as profits so as to be shared by the others⁹.

1 There is no single definition of the word 'profits' which will fit all cases: *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353 at 366 per Farwell J. Cf, however, the definition given by Fletcher Moulton LJ in *Re Spanish Prospecting Co Ltd* [1911] 1 Ch 92 at 98, CA. The rise in value of fixed plant or real estate belonging to a partnership is profit: *Robinson v Ashton, Ashton v Robinson* (1875) LR 20 Eq 25 at 28 per Jessel MR. Upon the construction of a particular partnership agreement 'profits' has been held to mean profits actually realised: *Croker v Kreeft, Kreeft v Croker* (1865) 13 LT 136. See also *Badham v Williams* (1902) 86 LT 191. In the case of a limited liability company, profits have been held to consist of the credit balance in the profit and loss account of each year: *Evling v Israel and Oppenheimer Ltd* [1918] 1 Ch 101. In *Bishop v Nicol's Trustees* 1921 SC 229, 'profits' was held to mean profits available for division after deduction of excess profits duty. The Partnership Act 1890 s 24(1) applies to post-dissolution profits: see *Popat v Shonchhatra* [1997] 3 All ER 800, [1997] 1 WLR 1367, CA; *Emerson v Estate of Thomas Emerson (deceased)* [2004] EWCA Civ 170, [2004] 1 BCLC 575.

2 Partnership Act 1890 s 24(1); and see PARA 124. See *Peacock v Peacock* (1809) 16 Ves 49; *Farrar v Beswick* (1836) 1 Mood & R 527; *Robinson v Anderson* (1855) 20 Beav 98 (affd 7 De GM & G 239). Cf *Sharpe v Cummings* (1844) 2 Dow & L 504. Where partners contribute to the capital of the partnership by funding the cost of acquiring partnership assets, those contributions are not determinative of the size of the partners' respective shares of the assets, since subject to any agreement to the contrary, the partners are entitled to share equally in the partnership property: *Popat v Shonchhatra* [1997] 3 All ER 800, [1997] 1 WLR 1367, CA.

3 See the Partnership Act 1890 s 24; and see *Robley v Brooke* (1833) 7 Bli NS 90, HL; *Warner v Smith* (1863) 1 De GJ & Sm 337; *Bell v Barnett* (1872) 21 WR 119.

4 *Stewart v Forbes* (1849) 1 Mac & G 137. See further PARA 111. See also the Partnership Act 1890 s 19; and PARA 40.

5 *Robinson v Anderson* (1855) 20 Beav 98; affd 7 De GM & G 239.

6 *Joyce v Morrissey* [1999] EMLR 233, [1998] 47 LS Gaz R 29, CA (failure of the partners to object to accounts drawn up on the basis of unequal distribution was not sufficient to rebut the presumption of equality).

7 *Webster v Bray* (1849) 7 Hare 159 at 178, 179; *Robinson v Anderson* (1855) 20 Beav 98 (affd 7 De GM & G 239); *Joyce v Morrissey* [1999] EMLR 233, [1998] 47 LS Gaz R 29, CA. As to management remuneration, however, see PARA 111.

8 *Hancock v Heaton* (1874) 30 LT 592 (affd 22 WR 784); and see *Bentley v Craven* (1853) 18 Beav 75; the Partnership Act 1890 s 29; and PARA 107.

9 *Alston v Sims* (1855) 1 Jur NS 438. It is otherwise when so treated by the partners themselves: *Collins v Jackson, Jackson v Collins* (1862) 31 Beav 645. Cf *Carlyon-Britton v Lumb* (1922) 38 TLR 298, where 'the salary from any office' was treated under the partnership deed as profits, and was held to include the pay received by a solicitor while an officer in the army during the 1914-18 war.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(6) DIVISION OF PROFITS AND INCIDENCE OF LOSSES/130. Partner's delay in claiming profits.

130. Partner's delay in claiming profits.

The right to claim a share of profits may be lost to a partner by laches¹, but only if his interest in the business is merely executory and not a present legal interest which is executed². In the former case, laches is sufficient to preclude him from obtaining equitable relief³; in the latter case, mere laches will not disentitle him from his legal rights unless it amounts to a waiver⁴ or abandonment⁵ of them.

Laches or acquiescence will not bar a firm's claim for profits against a partner or former partner who has secretly obtained the renewal of a partnership licence for himself⁶.

1 As to the doctrine of laches see **EQUITY** vol 16(2) (Reissue) PARA 910 et seq. As to limitation periods see the Limitation Act 1980; and **LIMITATION PERIODS**.

2 The distinction is discussed in *Rule v Jewell* (1881) 18 ChD 660 at 662 et seq per Kay J.

3 *Prendergast v Turton* (1841) 1 Y & C Ch Cas 98 (affd (1843) 13 LJ Ch 268); *Jones v North Vancouver Land and Improvement Co* [1910] AC 317 at 328, PC. Where there has been laches, the mere assertion of rights, unaccompanied by any act to give effect to it, is not sufficient to preserve them (*Clegg v Edmondson* (1857) 8 De GM & G 787), especially where there has been expenditure in a speculative undertaking (*Norway v Rowe* (1812) 19 Ves 144; *M'Lure v Ripley* (1850) 2 Mac & G 274). Recognition may, however, counterbalance laches: *Penny v Pickwick* (1852) 16 Beav 246; *Clements v Hall* (1858) 2 De G & J 173.

4 *Clarke and Chapman v Hart* (1858) 6 HL Cas 633 at 655; *Rule v Jewell* (1881) 18 ChD 600, distinguishing *Clarke and Chapman v Hart* and *Prendergast v Turton* (1841) 1 Y & C Ch Cas 98 (affd (1843) 13 LJ Ch 268).

5 *Palmer v Moore* [1900] AC 293, PC. See also *Lake v Craddock* (1733) 3 P Wms 158.

6 *Blundon v Storm* [1972] SCR 135, 20 DLR (3d) 413, Can SC; and see PARA 107.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(6) DIVISION OF PROFITS AND INCIDENCE OF LOSSES/131. Profits made after dissolution.

131. Profits made after dissolution.

A partner continuing the business with partnership assets after dissolution must account for profits¹ up to the final winding up of the concern²; and surviving partners who carry on the business must account for the profits of the share of a deceased partner up to the time of the liquidation of the assets³.

In the absence of any agreement to the contrary, the outgoing partner⁴, or his personal representative if he is dead, has a statutory right to elect to charge the continuing or surviving partner either with the share of profits since the dissolution which the court may find to be attributable to the use of his share of the assets, or, at his option, to interest at 5% per annum from the date of dissolution on the amount of that share⁵. This right exists even where, under the partnership agreement, the continuing or surviving partner has an option to buy the share of the outgoing or deceased partner, unless the terms of the option have been duly exercised⁶. If, however, the option is exercised, the outgoing partner or the representative of the partner is not entitled to any further share of profits⁷; his rights are governed by the partnership agreement⁸. Profits left in the business are not necessarily regarded as capital, for example for the purpose of bearing interest, unless there is an agreement to this effect, or unless they are treated as capital in the partnership books⁹.

1 *Crawshay v Collins* (1826) 2 Russ 325. He may, however, have a claim for 'just allowances': *Crawshay v Collins* at 347; and see PARAS 111, 129. As to the distribution of profits after dissolution see PARA 201 et seq. See also *John Taylors (a firm) v Masons (a firm)* [2001] EWCA Civ 2106, [2001] All ER (D) 381 (Nov) (goodwill and business connections could amount to a partnership asset which might exist following the dissolution of a partnership).

2 This is not necessarily in the same proportions as those in which the shares were held: *Willett v Blanford* (1842) 1 Hare 253; *Yates v Finn* (1880) 13 ChD 839. As to liability to account for profits after retirement where the outgoing partner had not fully declared his interest in a competing company see *Lindsley v Woodfull* [2004] EWCA Civ 165, [2004] 2 BCLC 131.

3 *Vyse v Foster* (1874) LR 7 HL 318; *Hordern v Hordern* [1910] AC 465, PC; cf *Croft v Pyke* (1733) 3 P Wms 180 (bankrupt partner). See also the Partnership Act 1890 s 29; and PARA 107. Where a partnership has been dissolved on the outbreak of war by reason of one of the partners becoming an alien enemy, he will be entitled to his share together with the profits made by it: *Hugh Stevenson & Sons Ltd v AG für Cartonnagen Industrie* [1918] AC 239 at 244, 246, HL. As to the capacity of aliens see PARA 34. Where one of the assets of a dissolved partnership is the lease of a farm occupied by one partner, and that partner's executors purchase the freehold reversion on the lease, any profit they make from the purchase is partnership profit: *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 All ER 1239, [1974] 1 WLR 605; and see PARAS 107-108.

4 For a consideration of the construction of this term in the Partnership Act 1890 s 42 see *Hopper v Hopper* [2008] EWHC 228 (Ch), [2008] 1 FCR 557, [2008] All ER (D) 275 (Feb), where Briggs J at [154] said: 'Where . . . a partnership is dissolved by the death of one of its members, the question whether any other partner is to be treated, on the one hand as a 'surviving or continuing partner' or on the other hand as an 'outgoing partner' depends in relation to each such partner whether he or she was party to the carrying on of the business of the firm with its capital or assets without any final settlement of accounts. In a two partner firm dissolved by the death by one of them, no problem arises. In a firm of more than two partners, the business of the firm may be carried on by one or more of the survivors. If all of them carry it on, then s 42 applies to regulate the mutual rights of the deceased partner's estate against all the surviving partners. On the other hand, if following the dissolution caused by a death of one of the partners, only some of the others carry on the business, then the partner or partners who do not may qualify, alongside the estate of the deceased, as outgoing partners for the purposes of claims under s 42(1)'.

5 Partnership Act 1890 s 42(1). Cf *Watson v Haggitt* [1928] AC 127, PC (partner's salary not deducted before ascertaining the share of net annual profits after dissolution, notwithstanding a contrary provision concerning

net profits during the partnership). See also *Sobell v Boston* [1975] 2 All ER 282, [1975] 1 WLR 1587. Where there has been a general dissolution (as opposed to a technical dissolution caused by the retirement (as in *Sobell v Boston*) or the expulsion or the death of a partner where, by virtue of the partnership agreement, the continuing or surviving partners acquire the outgoing partner's share at a valuation) so that the firm must be wound up and its assets sold, the option under the Partnership Act 1890 s 42(1) does not extend to capital profits or losses ie to the increase or decrease in value of the partnership property between dissolution and the conclusion of winding up: see *Popat v Shonchhatra* [1997] 3 All ER 800, [1997] 1 WLR 1367, CA; *Emerson v Estate of Thomas Emerson (deceased)* [2004] EWCA Civ 170, [2004] 1 BCLC 575 (the outgoing partner's share would be ascertained by reference to the Partnership Act 1890 s 24(1): see PARA 129). A partner is entitled to such capital profits in any event since the amount of the share is valued as at the date it is realised, not the date of death: *Meagher v Meagher* [1961] IR 96; and see *Barclays Bank Trust Co Ltd v Bluff* [1982] Ch 172, [1981] 3 All ER 232, approved and followed in *Chandroutie v Gajadhar* [1987] AC 147, [1987] 2 WLR 1, PC (where the plaintiff surviving partner had been ousted from the partnership business and the other partner, the plaintiff's son, had subsequently died, so dissolving the partnership; the surviving partner sought an account and winding up three years after her son had died; it was held that, notwithstanding the delay, the plaintiff was entitled to the relief sought, and the fact that she had brought the action against the non-partner, the son's widow, who had carried on the business after her husband's death rather than her son's personal representatives, was no bar to recovery); and see PARAS 201-203.

Where, after a general dissolution of the firm, one partner holds all the assets of the firm and the other partner all the liabilities, a constructive trust may be imposed on the former, who may, additionally, have to pay compound interest (at the commercial rate) to his former partner in respect of the value of those assets which he holds: *Roxburgh Dinardo & Partners' Judicial Factor v Dinardo* 1992 GWD 6-322 (the facts of which are, however, extreme).

The reference in the Partnership Act 1890 s 42(1) to 'the partnership assets' is to the net partnership assets; and the 'share' for the purposes of s 42(1) is to be assessed by reference to the share which the partner in question was entitled to receive at the conclusion of the winding up process: *Sandhu v Gill* [2005] EWCA Civ 1297, [2006] 2 WLR 8.

6 Partnership Act 1890 s 42(2). As to the position of an outgoing partner whose share is purchased see PARA 201.

7 Partnership Act 1890 s 42(2). If any partner assuming to act in exercise of the option does not comply strictly with it, he is liable to account: s 42(2).

8 See PARA 41.

9 *Dinham v Bradford* (1869) 5 Ch App 519 at 524; cf *Pilsworth v Mosse* (1862) 14 I Ch R 163; *Ibbotson v Elam* (1865) LR 1 Eq 188; *Wood v Scoles* (1866) 1 Ch App 369; *Binney v Mutrie* (1886) 12 App Cas 160, PC; *Straker v Wilson* (1871) 6 Ch App 503 at 510; *Garwood v Garwood* (1911) 105 LT 231, CA. Since annuities, ie payments made out of partnership profits by a continuing partner or partners to a retired partner or his estate, constitute a deductible expense of the partnership business, such annuities will affect the income tax liability of the continuing partner or partners to pay tax: see *IRC v Hogarth* 1941 SC 1; *IRC v Hunter* 1955 SC 248; *IRC v H* 1955 SLT (Notes) 60; and **INCOME TAXATION** vol 23(1) (Reissue) PARA 483.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(6) DIVISION OF PROFITS AND INCIDENCE OF LOSSES/132. Partners bear losses equally.

132. Partners bear losses equally.

In the absence of express or implied agreement, partners must contribute equally towards losses, whether of capital or otherwise, sustained by the firm¹. When the profits are not shared equally, the losses are, in the absence of agreement, to be borne in the same proportions as the profits are shared², regardless of whether one partner has put up more capital than the other³.

The liability of a partner to contribute to losses may be limited or excluded as between the partners by express or implied agreement⁴, and will not necessarily be extended by the fact that the loss is mainly attributable to his acts⁵.

1 Partnership Act 1890 s 24(1).

2 *Re Albion Life Assurance Society* (1880) 15 ChD 79; affd 16 ChD 83, CA.

3 *Nowell v Nowell* (1869) LR 7 Eq 538. In such a case, however, the losses are borne by the partners before their capital is repaid to them: *Garner v Murray* [1904] 1 Ch 57; and see PARA 211.

4 Partnership Act 1890 s 24(1); *Geddes v Wallace* (1820) 2 Bli 270, HL. As to the sharing of losses being evidence of the existence of a partnership see PARA 16.

5 *Cragg v Ford* (1842) 1 Y & C Ch Cas 280. As to the right of a partner to indemnity see PARAS 138-139. Where a partner is injured by a negligent act and his incapacity causes a reduction in the profits of the partnership, he can recover his share of the loss in a claim for damages for personal injuries: see *Lee v Sheard* [1956] 1 QB 192, [1955] 3 All ER 777, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(6) DIVISION OF PROFITS AND INCIDENCE OF LOSSES/133. Rights of personal representatives of deceased partner.

133. Rights of personal representatives of deceased partner.

Where a partnership has been formed for the purpose of effecting a specific undertaking or object and a partner in that firm dies, the surviving partners cannot compel the executor of a deceased partner to accept a valuation; he is entitled to a share of the profits found due on completion of the undertaking¹. The principles adopted during a partnership with regard to ascertaining what is capital and what is income have been held, upon the construction of the will of a deceased partner, to govern the interest of a deceased partner during the continuance of the business by his trustees or executors². Undrawn profits in an accounting period prior to the death of a partner are, however, capital of the estate of the deceased partner unless his will otherwise provides³.

1 *McClellan v Kennard* (1874) 9 Ch App 336; and see *Reade v Bentley* (1858) 4 K & J 656; cf *Ambler v Bolton* (1872) LR 14 Eq 427.

2 *Gow v Forster* (1884) 26 ChD 672. For example, in the absence of agreement, the conventional periods of accounting should be observed: *Browne v Collins* (1871) LR 12 Eq 586.

3 *Re Robbins, Midland Bank Executor and Trustee Co Ltd v Melville* [1941] Ch 434, [1941] 2 All ER 601.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(6) DIVISION OF PROFITS AND INCIDENCE OF LOSSES/134. When interest is payable on a partner's capital.

134. When interest is payable on a partner's capital.

Except when he has made actual payment or advance beyond the amount of capital which he has agreed to subscribe¹, a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him², unless there is an express or implied agreement, or a particular course of dealing between the partners as shown by the partnership books, or a trade custom to the contrary³; but the court allows interest on the restitution of money of the firm which has been expended or withheld by a partner, and of secret profits made by a partner in breach of good faith towards his partners⁴.

1 See the Partnership Act 1890 s 24(3); and PARA 138.

2 Partnership Act 1890 s 24(4).

3 Further, the ordinary rule is that a partner is not charged with interest in respect of overdrawings: *Suleman v Abdul Latif* (1930) LR 57 Ind App 245 at 249, PC, per Lord Russell (where it was held that, in a decree for dissolution and taking of the partnership accounts, interest should be allowed only from the date of the final decree by which the amount, if any, was found due, and not from the date of the plaint). Cf *Boddam v Ryley* (1783) 1 Bro CC 239, (1785) 2 Bro CC 2 (on appeal (1787) 4 Bro Parl Cas 561, HL); *Millar v Craig* (1843) 6 Beav 433; *Stevens v Cook* (1859) 5 Jur NS 1415; *Rhodes v Rhodes* (1860) 6 Jur NS 600; *Hill v King* (1863) 3 De GJ & Sm 418; *Cooke v Benbow* (1865) 3 De GJ & Sm 1; *Rishton v Grissell* (1868) LR 5 Eq 326. In *Boddam v Ryley* no interest was allowed to the estate of a surviving partner who had kept the accounts so badly that a considerable interval elapsed before the balances could be ascertained. Even if the terms of a partnership agreement provide for the payment of interest on capital, such interest will not be payable after the date of the dissolution unless so agreed: *Watney v Wells* (1867) 2 Ch App 250; *Barfield v Loughborough* (1872) 8 Ch App 1. Nor is a partner under the term of a partnership agreement entitled to be credited with the amount of undivided profits as additional capital, and accordingly to receive interest on them, unless they have been so treated in the partnership books or otherwise left in the business as capital by agreement: *Dinham v Bradford* (1869) 5 Ch App 519. Under the terms of a partnership agreement which provides for payment of interest on capital and also for payment of interest (instead of profits) on the value of the share of a deceased or retiring partner as it stands on the last account, the estate of a deceased partner has been held to be entitled to interest on his capital, and also interest on the value of his share instead of profits: *Browning v Browning* (1862) 31 Beav 316.

4 *Fawcett v Whitehouse* (1829) 1 Russ & M 132; *York and North Midland Rly Co v Hudson* (1853) 16 Beav 485 at 505; *Hart v Clarke* (1854) 6 De GM & G 232 at 254 (affd on other grounds (1858) 6 HL Cas 633); *Evans v Coventry* (1857) 8 De GM & G 835. See also *Stainton v Carron Co* (1857) 24 Beav 346 at 362. Where, however, accounts have not been asked for, or only demanded at irregular intervals, the accounting party will not be charged with interest on balances retained in his hands in the absence of any wilful withholding, or falsification of the accounts, or other fraudulent dealing with the money: *Turner v Burkinshaw* (1867) 2 Ch App 488.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(7) ACCOUNTS/135. Partners' rights to accounts.

(7) ACCOUNTS

135. Partners' rights to accounts.

Each partner, or his legal personal representative, is entitled as against the other partners to true accounts and to full information of all things affecting the partnership¹. He may insist that the firm's capital assets are properly valued in the accounts notwithstanding past practice². An auditor's certificate as to an amount of undrawn profits is not binding if founded on a mistaken interpretation of a written agreement³. If on retiring a partner has left his capital in the business, reserving a right of access to the books, and liberty to call in his capital upon breach of provisions which are intended to satisfy him as to the continued solvency of the firm, his personal representatives are entitled to accounts at their discretion⁴.

Where a partner retires, either ad hoc or in accordance with the partnership agreement, and leaves his share in the firm, he no longer has any continuing interest or share in the assets, but is merely a creditor of the firm so that the retiring partner may sue the continuing partners for the value of his share in the assets of the firm or for any sum that the continuing partners agreed to pay the former upon his retirement without the necessity, first of all, of taking a general account⁵.

1 Partnership Act 1890 s 28. See *Habershon v Blurton* (1847) 1 De G & Sm 121 (plaintiff's share and interest in the partnership were seized under a fieri facias and sold by the sheriff to a person who sold to the plaintiff's partner; plaintiff was held to be entitled to an account, as there might be something coming to him which was not seizable by the sheriff). An order for accounts may be obtained even though the claimant has misconducted himself in relation to the partnership business: *Ram Singh v Ram Chand* (1923) LR 51 Ind App 154, PC. A partner's duty to his co-partner under the Partnership Act 1890 s 28 may override that partner's duty of confidentiality which as a solicitor he owes to his client: see *Moser v Cotton* [1990] NLJR 1313, CA (on the facts a somewhat unusual case). See also PARA 150 et seq.

Where a partnership is formed under the law of any part of the United Kingdom and each of its members is either (1) a limited company; or (2) an unlimited company, or a Scottish partnership, each of whose members is a limited company, then the Partnerships (Accounts) Regulations 2008, SI 2008/569, govern the form in which the accounts are to be drawn up. As to the requirements of accounts generally see **COMPANIES** vol 15 (2009) PARA 708 et seq.

2 *Noble v Noble* 1965 SLT 415. As to when goodwill should be treated as an asset see PARA 216. As to when certain assets generally will be held to be partnership assets, whether or not they are included within the partnership accounts as assets of the firm, see PARAS 116-117.

3 *Smith v Gale* [1974] 1 All ER 401, [1974] 1 WLR 9 (where Goulding J held that he had jurisdiction to order payment of the correct sum due).

4 *Re Bennett, Jones v Bennett* [1896] 1 Ch 778, CA.

5 *Sobell v Boston* [1975] 2 All ER 282, [1975] 1 WLR 1587; and see *Brown v Rivlin* [1983] CA Transcript 56, applying *Gopala Chetty v Vijayaraghavachariar* [1922] 1 AC 488. As to the normal rule that partners are not creditors of each other see PARAS 5, 82, 158.

UPDATE

135 Partners' rights to accounts

NOTE 1--See *Hammonds (a firm) v Jones* [2009] EWCA Civ 1400, [2009] All ER (D) 208 (Dec) (partner in legal firm bound by accounts in year in which he left partnership).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(7) ACCOUNTS/136. Right to inspect books and documents.

136. Right to inspect books and documents.

Subject to express or implied agreement to the contrary, the partnership books are to be kept at the place of business of the partnership, or the principal place, if there is more than one, and every partner may, when he thinks fit, have access to and inspect and copy any of them¹. Subject to reasonable limitations, an agent may inspect them for him². They may become his exclusive property on dissolution, by agreement³, but the court will not order the books to be taken from solvent partners, if one partner is bankrupt⁴.

A partner or his agent may not make improper use of information so obtained⁵. A partner may not remove copies of partnership documents from the partnership premises to make use of them when he has dissolved the partnership⁶. Items not connected with the partnership business may be sealed up⁷.

The partnership books are evidence for and against any of the partners in the absence of proof of any fraudulent or erroneous omission or insertion of items⁸.

1 Partnership Act 1890 s 24(9). Partners are bound to render to any partner or his legal representatives true accounts and full information of all things affecting the partnership: see s 28; and PARA 135. See *Re Martindale, ex p Trueman* (1832) 1 Deac & Ch 464 (assignees of a bankrupt partner obtained inspection of books which remained the property of both partners after dissolution, although a release in respect of some of the partnership's dealings had been executed and notwithstanding an interval of some 12 years between dissolution and bankruptcy); *Taylor v Rundell* (1841) 1 Y & C Ch Cas 128; *Walmsley v Walmsley* (1846) 3 Jo & Lat 556 (books withheld; the courts allowed 10% as profits). See also *Re Burnand, ex p Baker, Sutton & Co* [1904] 2 KB 68, CA.

2 *Bevan v Webb* [1901] 2 Ch 59, CA.

3 *Lingen v Simpson* (1824) 1 Sim & St 600.

4 *Re Coverdale, ex p Finch* (1832) 1 Deac & Ch 274. See also *Dacie v John* (1824) 13 Price 446 (books in custody of the former managing partner, who offered free access to them; no order made).

5 *Trego v Hunt* [1896] AC 7 at 26, HL; cf *Mutter v Eastern and Midlands Rly Co* (1888) 38 ChD 92, CA; and *Duché v Duché* (1920) 149 LT Jo 338, CA. As to production by partners who have allowed an executor to place his accounts in the general books see *Freeman v Fairlie* (1817) 3 Mer 24 at 43. The best account possible, without undue labour and expense, must be furnished. As to the sufficiency of answers to interrogatories (now termed 'requests for information') with reference to books of account see *Drake v Symes* (1859) 10 John 647; and as to sufficiency of description of numerous documents for the purpose of production in a claim for account see *Christian v Taylor* (1841) 11 Sim 401 at 405. Where it has been referred to a special referee to take the accounts, any order for discovery required for working out the account should be made by him: *Korkis v Andrew Weir & Co* (1914) 110 LT 794, CA.

6 *Floydd v Cheney, Cheney v Floydd* [1970] Ch 602, [1970] 1 All ER 446.

7 *Re Pickering, Pickering v Pickering* (1883) 25 ChD 247, CA.

8 *Lodge v Prichard* (1853) 3 De GM & G 906. Partnership books are evidence for and against all the partners on the principle that they are the acts and declarations of such partners, being kept by themselves or by their authority by their employees and under their direction and superintendence: see *Hill v Manchester and Salford Waterworks Co* (1833) 2 Nev & MKB 573 at 582 per Denman CJ. Where, however, the issue is as to what is partnership property, the way in which the assets have been treated in the partnership accounts is not necessarily conclusive upon the issue, especially where there is another explanation for the asset's treatment vis-à-vis the accounts: see *Barton v Morris* [1985] 2 All ER 1032, [1985] 1 WLR 1257; *Noble v Noble* 1965 SLT 415; and see PARAS 116-117; and **CIVIL PROCEDURE** vol 11 (2009) PARA 951.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(7) ACCOUNTS/137. Order for production of books.

137. Order for production of books.

Where a partnership claim is pending, books in daily use are usually ordered to be produced at the place of business, but production may be ordered in court where a party cannot be trusted with the custody of the books¹. A defendant partner may obtain production and inspection of the partnership books and documents before service of his defence if they are in the claimant's hands and he cannot prepare his defence without such inspection².

A solicitor cannot, as against his former partner, claim client privilege when ordered to produce bills paid to him by clients³.

1 *Mertens v Haigh* (1860) John 735; affd (1863) 3 De GJ & Sm 528.

2 *Pickering v Rigby* (1812) 18 Ves 484. As to the method of obtaining inspection see **CIVIL PROCEDURE**. See *Turney v Bayley* (1864) 4 De GJ & Sm 332 (on an interlocutory application by a party whose status as a partner was disputed, production of books was refused); and see *Turner v Bayley* (1864) 34 Beav 105. As to accounts and their production in a claim see PARA 150 et seq. As to claims against partners and firms and disclosure in such claims see PARAS 84, 91.

3 *Lewthwaite v Stimson* (1966) 110 Sol Jo 188; and see *Moser v Cotton* [1990] NLJR 1313, CA. See also **LEGAL PROFESSIONS** vol 66 (2009) PARA 956.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(8) RIGHT TO INDEMNITY/138. Extent of right to indemnity.

(8) RIGHT TO INDEMNITY

138. Extent of right to indemnity.

Subject to any express or implied agreement, each partner is entitled to be indemnified by his firm out of its assets, or by way of contribution by his partners, in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the partnership business¹, or in or about anything necessarily done for the preservation of the firm's business or property². The right extends to expenditure for partnership purposes made with the express or implied consent of the other partners³; and it is immaterial that the expenditure proves to be useless or unprofitable if it has been approved of or ratified by the firm⁴.

A partner who pays more than his share of a partnership debt, whether voluntarily or not⁵, is entitled to contribution from his co-partners⁶. Where one of two partners who are jointly liable has paid a judgment debt, he is entitled, in order to enforce his right to contribution, to an assignment of the judgment and of all securities for the debt⁷, subject to the equities subsisting between the debtors as partners⁸.

Payments or advances made by a partner for partnership purposes beyond the capital he has agreed to subscribe carry interest, subject to any express or implied agreement, at 5 per cent per annum from the date of the payment or advance⁹.

1 Partnership Act 1890 s 24(2)(a). See also note 2.

2 Partnership Act 1890 s 24(2)(b). See *Browne v Gibbins* (1725) 5 Bro Parl Cas 491, HL; *Wright v Hunter* (1801) 5 Ves 792; *Denton v Rodie* (1813) 3 Camp 493; *Evans v Yeatherd* (1824) 2 Bing 133; *McOwen v Hunter* (1838) 1 Dr & Wal 347; *Prole v Masterman* (1855) 21 Beav 61; *Re Royal Bank of Australia, Robinson's Executor's Case* (1856) 6 De GM & G 572; *Re Norwich Yarn Co, ex p Bignold* (1856) 22 Beav 143. Income tax assessed on the profits of a partnership is a partnership liability: see PARA 100; and **INCOME TAXATION**. Accordingly, a partner who paid all the firm's income tax would in the normal course of events have the right of indemnity. Equally, where a retiring partner was given an indemnity by the continuing partner against 'all debts and liabilities of the partnership', such an indemnity was held to encompass the firm's entire income tax liability assessed against it: *Stevens v Britten* [1954] 3 All ER 385, [1954] 1 WLR 1340, CA. As to the effect of express agreements to discharge tax liabilities at dissolution see PARA 200.

3 *Gleadow v Hull Glass Co* (1849) 13 Jur 1020; *Hamilton v Smith* (1859) 28 LJ Ch 404; *Matthews v Ruggles-Brise* [1911] 1 Ch 194 (estate of a deceased partner who had taken an onerous lease as trustee for his firm held entitled to be indemnified by his partners against money paid under the covenants in the lease, although the lease (with the other partnership assets) had been assigned to a limited company which covenanted to indemnify the partners, including the trustee of the deceased, against the partnership liabilities).

4 *Burden v Burden* (1813) 1 Ves & B 170 (allowance made to a surviving partner for expenses of carrying on the business for himself and the children of the deceased partner, but not for his management or time and labour); *Cragg v Ford* (1842) 1 Y & C Ch Cas 280 (loss occurred through delay by one partner in selling); *Re Oundle Union Brewery Co, Croxton's Case* (1852) 5 De G & Sm 432; *Re Court Grange Silver-Lead Mining Co, ex p Sedgwick* (1856) 2 Jur NS 949 (acquiescence in liabilities incurred by a managing director); *Re Protestant Assurance Association, ex p Letts and Steer* (1857) 26 LJ Ch 455; *Burdon v Barkus* (1861) 3 Giff 412 (affd (1862) 4 De GF & J 42 (outlay by the firm on property belonging exclusively to one partner)); *Pawsey v Armstrong* (1881) 18 ChD 698 at 707.

5 *Sadler v Nixon* (1834) 5 B & Ad 936; *Wilson v Cutting* (1834) 10 Bing 436. See **CONTRACT** vol 9(1) (Reissue) PARA 1121.

6 *Boulter v Peplow* (1850) 9 CB 493; *Batard v Hawes* (1853) 2 E & B 287; *Sedgwick v Daniell* (1857) 2 H & N 319. In the absence of special circumstances, a partner could not formerly sue for contribution at law; his remedy was in equity: *Sadler v Nixon* (1834) 5 B & Ad 936.

7 le under the Mercantile Law Amendment Act 1856 s 5: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1138 et seq.

8 *Dale v Powell* (1911) 105 LT 291.

9 Partnership Act 1890 s 24(3); *Spartali v Constantinidi* (1872) 20 WR 823 (interest allowed to two partners on sums advanced by them in excess of their due proportion of capital, such sums being treated as a debt wrongfully withheld).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(8) RIGHT TO INDEMNITY/139. Limit on right to indemnity.

139. Limit on right to indemnity.

The right of indemnity does not extend to joint transactions where no partnership subsists¹. Nor does it extend to sums paid by a partner for which the partnership is not liable², or to losses due to his own fraud or culpable negligence in the conduct of the partnership affairs³. On the contrary, he must compensate or indemnify the partnership against such losses⁴. The principle of indemnity does not extend to private loans from one partner to another, but is confined to partnership transactions⁵.

Partners are not entitled to be credited, as against the trustee of a bankrupt partner, with sums which he had paid as agent for the partnership before he became a partner⁶.

1 *Sedgwick v Daniell* (1857) 2 H & N 319; and see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 86. As to the extent of the right to indemnity see PARA 138.

2 *M'Ilreath v Margetson* (1785) 4 Doug KB 278; *Re Webb* (1818) 2 Moore CP 500.

3 *Thomas v Atherton* (1878) 10 ChD 185, CA.

4 *Bury v Allen* (1845) 1 Coll 589; *Robertson v Southgate* (1848) 6 Hare 536.

5 *Ryall v Rowles* (1749) 1 Atk 165. 'The partnership stock is no further subject to debts from one partner to another than is the money which has been applied to the partnership': *Ryall v Rowles* at 181 per Lee CJ.

6 *Smith v De Silva* (1776) 2 Cowp 469, as explained in *Holderness v Shackels* (1828) 8 B & C 612 at 618 per Lord Tenterden CJ.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(8) RIGHT TO INDEMNITY/140. No indemnity because of agreement.

140. No indemnity because of agreement.

A partner's liability to indemnify his firm may be expressly limited¹; and a person, although liable as a partner to persons dealing with the firm, may be relieved from liability to contribute to partnership debts as between himself and his partners by the method of dealing adopted by the firm².

The right to indemnity will be lost if the partners agree to convert the firm property into their separate property³.

1 *Gillan v Morrison* (1847) 1 De G & Sm 421; *Re Worcester Corn Exchange Co* (1853) 3 De GM & G 180. See also PARAS 138-139. As to the principles of contribution generally see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 80 et seq; **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1013 et seq.

2 *Geddes v Wallace* (1820) 2 Bli 270, HL. See also *Dale v Powell* (1911) 105 LT 291. See now, however, the Civil Liability (Contribution) Act 1978 s 7(3), whereby the right to recover contribution supersedes any right other than an express contractual right to recover such contribution; sed quaere whether a course of dealing between partners such as to constitute a variation of their partnership agreement under the Partnership Act 1890 s 19 (see PARA 40) constitutes such an express contractual right.

3 *Lingen v Simpson* (1824) 1 Sim & St 600; *Holroyd v Griffiths* (1856) 3 Drew 428. See also *Ex p Ruffin* (1801) 6 Ves 119; *Re Hayward, ex p Burdekin* (1842) 2 Mont D & De G 704; *Re Langmead's Trusts* (1855) 20 Beav 20 (affd 7 De GM & G 353). The right may be expressly preserved: *Holderness v Shackels* (1828) 8 B & C 612.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(8) RIGHT TO INDEMNITY/141. No right to indemnity where partnership illegal or there is delay.

141. No right to indemnity where partnership illegal or there is delay.

The right of contribution¹ does not exist if the partnership is itself illegal²; but, if the partnership is not illegal, the fact that the act for which the firm is liable is unlawful does not prevent an innocent partner from obtaining contribution from the guilty partners³.

The right to indemnity may be lost by delay⁴.

1 See PARAS 29, 138.

2 See PARA 30; and *Foster v Driscoll*, *Lindsay v Attfield*, *Lindsay v Driscoll* [1929] 1 KB 470, CA.

3 *Campbell v Campbell* (1840) 7 Cl & Fin 166, HL. See also the cases cited in PARA 30. There is no lien for contributed money between co-owners who are not partners: *Kay v Johnston* (1856) 21 Beav 536; *Re Coulson's Trusts*, *Prichard v Coulson* (1907) 97 LT 754; cf *Leigh v Dickeson* (1884) 15 QBD 60, CA; and see *Re Leslie*, *Leslie v French* (1883) 23 ChD 552 at 564.

4 *West v Skip* (1749) 1 Ves Sen 239.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(9) PARTNER'S LIEN/142. Nature of partner's lien.

(9) PARTNER'S LIEN

142. Nature of partner's lien.

On the dissolution of a partnership¹, each partner has a general lien on the firm's surplus assets², which arises out of his statutory right to have the surplus assets, after payment of the firm's debts and liabilities, applied in payment of what may be due to the partners respectively³ after deducting what may be due from them as partners to the firm⁴.

The lien is not one which affects each particular piece of property belonging to the partnership. It is in the nature of a general lien upon the surplus assets, and does not affect each particular asset so as to interfere with the right of a surviving partner to deal with the separate assets belonging to the partnership for the purposes of realisation and to give a good title to persons dealing in good faith with him in respect of those assets⁵.

A partner also has a specific statutory lien on the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, where a partnership agreement is rescinded on the ground of the fraud or misrepresentation of a co-partner⁶.

1 lie upon the general dissolution of the firm, not a technical dissolution caused by the admission or departure of a partner: see generally PARAS 29 note 8, 44, 112 note 1, 179, 205.

2 Not all a firm's assets can, however, be regarded as property which can constitute the subject of a partner's lien: *Faulks v Faulks* [1992] 1 EGLR 9 (milk quota registered in the name of a farming partnership); and see *Robertson v Brent and Haggitt* [1972] NZLR 406, NZ SC (work in progress in a solicitors' firm held not to be an asset). As to lien generally see **LIEN**.

3 As to the application of assets on dissolution see PARA 212.

4 See the Partnership Act 1890 s 39; and PARA 206. See also *Skipp v Harwood* (1747) 2 Swan 586; *West v Skip* (1749) 1 Ves Sen 239; *Ex p Williams* (1805) 11 Ves 3; *Ex p King* (1810) 17 Ves 115; *Harvey v Crickett* (1816) 5 M & S 336; *Hague v Dandeson* (1848) 2 Exch 741 at 745 per Parke B; *Kelly v Hutton* (1868) 3 Ch App 703 at 708, 709; *Aberdare and Plymouth Co Ltd v Hankey* (1887) 3 TLR 493; *Hadlee v IRC* [1993] AC 524, [1993] 2 WLR 696, PC. It may be that in exceptional circumstances the court will go further and impose a constructive trust: see *Gordon v Gonda* [1955] 2 All ER 762, [1955] 1 WLR 885, CA; and see PARA 106. It seems that there is no lien as between persons who are merely part owners (*Re Leslie, Leslie v French* (1883) 23 ChD 552 at 563) or co-adventurers (*Re Boggs, ex p Gemmel* (1843) 3 Mont D & De G 198).

5 *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427 at 432, CA, per Romer LJ. For this purpose, no distinction can be drawn between real estate held for partnership purposes and personal estate: *Re Bourne, Bourne v Bourne* at 433. As to equitable lien generally see **LIEN** vol 68 (2008) PARA 855 et seq.

6 See the Partnership Act 1890 s 41(a); and PARA 148. See also *Mycock v Beatson* (1879) 13 ChD 384; *Binney v Mutrie* (1886) 12 App Cas 160 at 165, PC. This lien appears wider than the general lien because it embraces the firm's assets before deduction has been made from them of what is due to the partners. As to the contractual nature of the relationship between partners see PARA 1 note 1.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(9) PARTNER'S LIEN/143. Extent of partner's lien.

143. Extent of partner's lien.

The lien of a partner may be enforced, not only against the partnership assets and the other partners, but also against all persons claiming through them in respect of their interests as partners¹, for example assignees², mortgagees³, personal representatives⁴, trustees in bankruptcy⁵ or judgment creditors⁶. It is not enforceable against purchasers, chargees or pledgees of specific assets of the partnership who might reasonably suppose that all the partnership debts had been paid or barred by lapse of time, or who otherwise deal with the surviving or continuing partner in good faith⁷. The right extends to the satisfaction of allowances or payments agreed to be made on the dissolution⁸.

During the continuance of the partnership, the right to indemnity constitutes a lien which attaches to all the property of the partnership for the time being, whatever may be its variations and changes⁹; but after dissolution it is limited to the partnership property existing as such at the date of the dissolution, and does not extend to property added to or substituted for the old stock by those who continue the business after that date¹⁰.

1 See the Partnership Act 1890 s 39; and PARA 206. As to the lien see PARA 142; and **LIEN**.

2 *West v Skip* (1749) 1 Ves Sen 239; *Holderness v Shackels* (1828) 8 B & C 612 at 618.

3 *Cavander v Bulteel* (1873) 9 Ch App 79.

4 *Stocken v Dawson* (1845) 9 Beav 239; affd (1848) 17 LJ Ch 282.

5 *Re Butterworth, ex p Plant* (1835) 4 Deac & Ch 160.

6 *Skipp v Harwood* (1747) 2 Swan 586.

7 *Re Langmead's Trusts* (1855) 20 Beav 20; on appeal 7 De GM & G 353. The purchaser of the share of a partner in the partnership takes subject to the lien: *Cavander v Bulteel* (1873) 9 Ch App 79.

8 *Re Ancell, ex p Rowlandson* (1813) 2 Ves & B 172. The lien does not, however, cover liabilities not arising out of the partnership, such as private loans by one partner to another (*Ryall v Rowles* (1749) 1 Ves Sen 348), but it extends to partnership money borrowed by one of the firm (*Meliorucchi v Royal Exchange Assurance Co* (1728) 1 Eq Cas Abr 8; *Croft v Pyke* (1733) 3 P Wms 180).

9 *Skipp v Harwood* (1747) 2 Swan 586; *West v Skip* (1749) 1 Ves Sen 239; *Hadlee v IRC* [1993] AC 524, [1993] 2 WLR 696, PC.

10 *Payne v Hornby* (1858) 25 Beav 280. This view is, however, contrary to that held by Lord Hardwicke, who, in two cases arising out of the same transaction, decided that the lien of a partner on dissolution was not limited to the stock brought in, but extended to everything coming in lieu during the continuance or after the determination of the partnership: *Skipp v Harwood* (1747) 2 Swan 586; *West v Skip* (1749) 1 Ves Sen 239 at 244, 456. See also *Pennell v Deffell* (1853) 4 De GM & G 372 at 388 per Turner LJ. In *Stocken v Dawson* (1848) 17 LJ Ch 282 at 286 the parties agreed that the property should be considered to have remained unchanged. As to the loss of partnership lien by distribution by agreement of the partnership assets see PARA 140 text and note 3; and **LIEN** vol 68 (2008) PARA 886.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(i) Parties to Partnership Actions/144. All partners must generally be parties or represented.

(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES

(i) Parties to Partnership Actions

144. All partners must generally be parties or represented.

The rights and liabilities of partners between themselves have been established in accordance with equitable principles¹. In a claim for dissolution of partnership it is a general rule that all the partners who are within the jurisdiction must be before the court², especially where questions affecting the rights of the partners between themselves³, or the construction of the partnership agreement⁴, are raised. The personal representative of a deceased partner should be a party even if the estate of the deceased partner is reputed to be insolvent⁵; and, generally, where there is a diversity of interest, all the partners should be parties to⁶ or represented in⁷ the claim.

1 See **EQUITY** vol 16(2) (Reissue) PARA 464.

2 *Ireton v Lewes* (1673) Cas temp Finch 96; *Hills v Nash* (1845) 1 Ph 594; *Simpson v Chapman* (1853) 4 De GM & G 154 at 167.

3 *Long v Yonge* (1830) 2 Sim 369. As to injunctions against breaches of the agreement between the partners eg against competitive trading see PARA 172.

4 *Cockburn v Thompson* (1809) 16 Ves 321; *Baldwin v Lawrence* (1824) 2 Sim & St 18; *Seddon v Connell* (1840) 10 Sim 58.

5 *Cox v Stephens* (1863) 11 WR 929; cf *Madox v Jackson* (1746) 3 Atk 405; *Seddon v Connell* (1840) 10 Sim 58.

6 *Van Sandau v Moore* (1826) 1 Russ 441; *Evans v Stokes* (1836) 1 Keen 24; *Harvey v Bignold* (1845) 8 Beav 343.

7 *Attwood v Small* (1838) 6 Cl & Fin 232, HL; *Cramer v Bird* (1868) LR 6 Eq 143.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(i) Parties to Partnership Actions/145. Representative parties.

145. Representative parties.

Where more than one partner has the same interest in a claim, the claim may be begun or the court may order that the claim be continued, by or against one or more of the partners who have the same interest as representatives of any other partners who have that interest¹. Where a claim is for the benefit of all the partners, that is, where there is a community of interest, all those having similar interests may be represented, either as claimants or defendants, by one or more of their number². If the common interest seems open to doubt, the court may give liberty to amend³.

Where two persons engage in the purchase of a joint cargo, but keep separate accounts with respect to each moiety, one of them is not a necessary party to a claim for an account concerning the moiety of the other⁴; and persons who have merely a contingent right to become partners should not be joined in a claim for dissolution and accounts⁵.

1 CPR 19.6(1); and see **CIVIL PROCEDURE** vol 11 (2009) PARA 229 et seq. See *Wood v McCarthy* [1893] 1 QB 775, DC (president and secretary of a labour protection league consisting of about 4,000 members were sued, and authorised, against their will, to defend on behalf of all the members).

2 *Cockburn v Thompson* (1809) 16 Ves 321; *Small v Attwood* (1832) 10 Ves 507 (varied (1838) 6 Cl & Fin 232, HL).

3 *Bainbridge v Burton* (1840) 2 Beav 539. The cases under the old practice are not altogether uniform. A distinction was drawn between an action for an account after the partnership had come to an end (*Richardson v Hastings* (1844) 7 Beav 301; further proceedings 7 Beav 323), and an action for dissolution (*Deeks v Stanhope* (1844) 14 Sim 57), or such an action for an account as was, in effect, an action for dissolution (*Abraham v Hannay* (1843) 13 Sim 581; cf *Seddon v Connell* (1840) 10 Sim 58; *Sibley v Minton* (1857) 27 LJ Ch 53). In the former type of case it was held that an action might be maintained by some partners on behalf of themselves and others; in the latter it was held that all the partners, however numerous, were necessary parties. In *Beaumont v Meredith* (1814) 3 Ves & B 180, it was held that all the members of a benevolent society had to be parties to an action by some members against the trustees for an account. See also *Moffat v Farquharson* (1788) 2 Bro CC 338; *Chancey v May* (1722) Prec Ch 592; *Taylor v Salmon* (1838) 4 My & Cr 134.

4 *Weymouth v Boyer* (1792) 1 Ves 416. See also *Brown v De Tastet* (1819) Jac 284 (account ordered between a partner and a sub-partner without making the other two principal partners parties to the action, one of them being ignorant of the sub-partnership, and the other out of the jurisdiction).

5 *Ehrmann v Ehrmann* (1894) 72 LT 17.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(i) Parties to Partnership Actions/146. Necessary parties.

146. Necessary parties.

The assignee of a share in a partnership is not, during the continuance of the partnership, a necessary party to a claim against the other partners for an account, but after the dissolution of the partnership he may become so¹. The personal representative of a deceased partner may sue for accounts even though he has assigned all the intestate's beneficial interest².

Where the share of a deceased partner is purchased by the surviving partners under a provision in the partnership agreement and the purchase money is allowed to remain in the business, contrary to the trusts of his will, all the partners who have notice of the trusts must be made defendants to a claim by the beneficiaries claiming profits made by the employment of that money in trade, and not merely such of them as are trustees³.

Where a partner creates an equitable mortgage upon the real estate of himself and a third person in favour of his firm and dies intestate, the firm cannot enforce the security without making his personal representative a party to the claim⁴.

A claim for a debt due to the partnership may, as a general rule, be brought by a surviving partner⁵, and a surviving partner must be brought before the court in a claim to enforce a partnership debt against the estate of his deceased partner⁶.

1 As to his rights see the Partnership Act 1890 s 31; and PARA 126. See also *Public Trustee v Elder* [1926] Ch 776, CA. In *Williams v Poole* (1873) 21 WR 252, an assignee, after dissolution, was held not to be a necessary party, being merely a 'dry trustee' for a satisfied mortgagee. A sub-partner has no right to an account from the principal partnership, but only from the partner with whom he is a sub-partner; therefore, the other partners are not necessary parties to a claim against that partner: see *Re Slyth, ex p Barrow* (1815) 2 Rose 252 at 255; *Brown v De Tastet* (1819) Jac 284. A partner who admits that another partner has no interest in the accounts may thereby lose the right to have that other partner before the court: see *Bodin v Farquhar* (1822) 1 LJOS Ch 21 (rehearing sought on the ground that that other partner ought to have been a party).

2 *Clegg v Fishwick* (1849) 1 Mac & G 294 (the effect of an assignment by an administratrix held to constitute her a trustee for the assignee).

3 *Vyse v Foster* (1874) LR 7 HL 318 at 335; cf *Pointon v Pointon* (1871) LR 12 Eq 547; and see PARA 131.

4 *Scholefield v Heafield* (1836) 7 Sim 667. As to the extent to which the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1) (a contract for the sale or other disposition of land to be made in writing: see PARA 39 notes 6, 7; and **SALE OF LAND**) affects equitable mortgages see **EQUITY** vol 16(2) (Reissue) PARA 606.

5 *Haig v Gray* (1850) 3 De G & Sm 741; cf *Sales v Crispi* (1913) 29 TLR 491 (surviving partner of a firm which acted as business agents and managers to a variety artiste held not entitled to commission on engagements obtained by the client after the partnership was dissolved). As to the implied authority of a partner to bring and defend claims on behalf of his firm during its currency see PARAS 47, 79 et seq.

6 *Hills v M'Rae* (1851) 9 Hare 297 (surviving partner ordered to attend before the master); and see *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177 at 192, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(ii) Fraud or Misrepresentation/A. FRAUD OR MISREPRESENTATION INDUCING PARTNERSHIP/147. Fraud invalidates an agreement, although discoverable.

(ii) Fraud or Misrepresentation

A. FRAUD OR MISREPRESENTATION INDUCING PARTNERSHIP

147. Fraud invalidates an agreement, although discoverable.

Fraud in inducing a person to enter into a partnership agreement is a ground for the rescission of the agreement¹, and the fact that the claimant could have discovered the truth, for example by examination of the books, is not a bar to relief²; nor is the fact that there cannot be restitution in integrum after the firm in which the interest has been acquired has become insolvent³. In a question of rescission of his contract by a partner on the ground of fraud or misrepresentation, there is no analogy, in the case of such insolvency, between the case of an ordinary partnership and that of an incorporated company⁴. The claim by a defrauded partner against his fraudulent partner may be framed alternatively for rescission or dissolution⁵, and he may in any event sue for the damages which he has sustained by reason of the fraud⁶.

Misrepresentation without fraud is a sufficient ground for rescission and the repayment of capital advanced⁷ and premium paid⁸.

1 *Beck v Kantorowicz, Kantorowicz v Carter, Kalb v Kantorowicz* (1857) 3 K & J 230 (one partner made a secret profit on the purchase of property for the partnership). It is no defence to a claim for damages for breach of an agreement to become a partner that the claimant has been guilty of fraud in another partnership: *Andrewes v Garstin* (1861) 10 CBNS 444. As to claims for breach of an agreement to enter into partnership generally see *Walker v Harris* (1793) 1 Anst 245; *Figes v Cutler* (1822) 3 Stark 139.

2 *Rawlins v Wickham, Wickham v Rawlins* (1858) 1 Giff 355 (affd 3 De G & J 304); cf *Riddel v Smith* (1864) 12 WR 899 (plaintiff continued the partnership after discovery of misrepresentation); *Redgrave v Hurd* (1881) 20 ChD 1, CA (contract of sale rescinded and the deposit returned, but no damages awarded). See also **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 802.

3 *Adam v Newbigging* (1888) 13 App Cas 308 at 330, HL, per Lord Herschell.

4 *Adam v Newbigging* (1888) 13 App Cas 308 at 322, HL, per Lord Watson; cf **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 833.

5 *Bagot v Easton* (1877) 7 ChD 1, CA.

6 *Cruikshank v M'Vicar* (1844) 8 Beav 106; *Beck v Kantorowicz* (1857) 3 K & J 230. As to the principle that a person may not approbate and reprobate see **ESTOPPEL** vol 16(2) (Reissue) PARA 962.

7 *Adam v Newbigging* (1888) 13 App Cas 308, HL.

8 *Jauncey v Knowles* (1859) 29 LJ Ch 95.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(ii) Fraud or Misrepresentation/A. FRAUD OR MISREPRESENTATION INDUCING PARTNERSHIP/148. Rights and liabilities of defrauded partner.

148. Rights and liabilities of defrauded partner.

Where a partnership agreement is rescinded on the ground of the fraud or misrepresentation of one of the parties to it, the partner entitled to rescind is entitled¹:

- 25 (1) to a lien² on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of his share in the partnership and for any capital contributed by him³;
- 26 (2) to a right of subrogation to the rights of the partnership creditors for any payments made by him to them in respect of the partnership liabilities⁴; and
- 27 (3) to be indemnified by the guilty partner against all partnership debts and liabilities⁵.

A person who is induced by fraud or misrepresentation to become a partner is liable to the partnership creditors in respect of all dealings taking place while he remains a partner and, in the event of bankruptcy of the partner by whom he was defrauded, will be allowed to prove for a premium paid on entering the partnership in competition with the separate creditors of the bankrupt partner, but not in competition with the joint creditors of the firm⁶.

1 These rights are without prejudice to any other right of the innocent partner: Partnership Act 1890 s 41. This provision merely declares the previous law: see *Mycock v Beatson* (1879) 13 ChD 384; *Newbigging v Adam* (1886) 34 ChD 582, CA (affd (1888) 13 App Cas 308, HL).

2 As to a partner's lien generally see PARA 142.

3 Partnership Act 1890 s 41(a).

4 Partnership Act 1890 s 41(b).

5 Partnership Act 1890 s 41(c).

6 *Re Hooper, ex p Broome* (1811) 1 Rose 69, as explained in *Bury v Allen* (1845) 1 Coll 589 at 598n, 607. Although, as against the guilty partner, he may have an equity to say that he never was a partner, it will be difficult to say so as against third persons: *Re Hooper, ex p Broome* at 71 per Lord Eldon LC.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(ii) Fraud or Misrepresentation/B. FRAUD OR MISREPRESENTATION ON PURCHASE OF PARTNERSHIP SHARE/149. Instances of fraud or misrepresentation giving rise to rescission.

B. FRAUD OR MISREPRESENTATION ON PURCHASE OF PARTNERSHIP SHARE

149. Instances of fraud or misrepresentation giving rise to rescission.

The sale of the share of one partner to another on the footing of a balance sheet prepared by the vendor's accountant and believed by both parties to be substantially correct may be set aside on proof that the balance sheet was grossly inaccurate and placed too high a value on the assets¹. A purchase of a partner's share at an undervalue by a partner who kept the books and knew and concealed from his partner the inadequacy of consideration may be declared void and set aside². This relief will not, however, be given when there has been no fraud or oppression, especially after long delay³.

A sale by the executors of a deceased partner to the surviving partners will be closely scrutinised by the court, but will be supported if no unfair advantage has been taken of the executors⁴. The sale will be set aside, however, if it is at an undervalue so gross as to be deemed fraudulent⁵. A sale by the executors of a deceased partner to a surviving partner for the purpose of resale to one of the executors has been set aside⁶.

1 *Charlesworth v Jennings* (1864) 34 Beav 96; and see *Smith v Gale* [1974] 1 All ER 401, [1974] 1 WLR 9.

2 *Maddeford v Austwick, Austwick v Maddeford* (1826) 1 Sim 89; affd (1833) 2 My & K 279. Nevertheless, a vendor who, after discovering that there has been concealment, elects to waive his right to full disclosure is bound by that election and neither he nor his personal representatives can repudiate the sale: *Law v Law* [1905] 1 Ch 140, CA.

3 *Knight v Marjoribanks* (1848) 11 Beav 322 (affd (1849) 2 Mac & G 10); approved in *Melbourne Banking Corp'n v Brougham* (1882) 7 App Cas 307, PC. See also *Re Lightoller, ex p Peake* (1816) 1 Madd 346.

4 *Chambers v Howell* (1847) 11 Beav 6; *Hordern v Hordern* [1910] AC 465, PC. See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 448.

5 *Rice v Gordon* (1848) 11 Beav 265.

6 *Cook v Collingridge* (1823) Jac 607.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/150. Time at which accounts may be ordered.

(iii) Order for Accounts

150. Time at which accounts may be ordered.

In a claim by a partner, or a person claiming through him for dissolution and winding up of the affairs of the partnership, the accounts¹ are usually directed at the trial².

¹ As to the right to an account see **PARAS** 135, 156.

² As to orders for accounts see CPR 24 (summary judgment); **CIVIL PROCEDURE** vol 11 (2009) **PARA** 524 et seq; **CIVIL PROCEDURE** vol 12 (2009) **PARA** 1524. Orders for accounts have been made at other stages of the claim: see *Turquand v Wilson* (1875) 1 ChD 85. See also *Kupfer v Kupfer* (1915) 60 Sol Jo 221 (where some of the partners were British subjects interned in Germany during the 1914-18 war, the partnership was declared dissolved and the usual partnership accounts were directed, but the accounts were not to be proceeded with until three months after the declaration of peace).

As to the remedy of account generally see **EQUITY** vol 16(2) (Reissue) **PARA** 449 et seq. As to the time limit in a claim for an account see **LIMITATION PERIODS** vol 68 (2008) **PARAS** 953, 1008-1009.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/151. Accounts ordered where dissolution not specifically claimed.

151. Accounts ordered where dissolution not specifically claimed.

As a general rule, the court will not order an account of partnership dealings unless the claimant also claims dissolution¹. An account may, however, be ordered without a claim for dissolution in a proper case, where a sufficient reason is shown for departing from the usual rule, as, for example, where a partner is trying to exclude his partner from some secret benefit or from the partnership, or to force him to a dissolution, or where there is a refusal to account, or where a limited account will meet the necessity or justice of the case².

In a claim for the administration of the estate of a deceased partner, the ordinary direction for an account of debts includes equitable debts, and therefore includes a debt due by the estate of the deceased partner on his separate account with the partnership, and a surviving partner can claim such a debt as a creditor of the deceased and have it ascertained by the taking of a partnership account³.

1 *Forman v Homfray* (1813) 2 Ves & B 329; *Loscombe v Russell* (1830) 4 Sim 8; *Richards v Davies* (1831) 2 Russ & M 347; *Knebell v White* (1836) 2 Y & C Ex 15 at 21; cf *Waters v Taylor* (1808) 15 Ves 10. As to claims for dissolution generally and the circumstances in which such claims will be stayed see PARAS 182-183.

2 *Harrison v Armitage* (1819) 4 Madd 143 (distinguishing *Forman v Homfray* (1813) 2 Ves & B 329); *Chapple v Cadell* (1822) Jac 537; *Bentley v Bates* (1840) 4 Y & C Ex 182 (where Lord Abinger CB said that the joint owners of a colliery are in the position of mercantile partners for some purposes only, and that the rule requiring a dissolution to be claimed was meant to apply only to mercantile partnerships); *Wallworth v Holt* (1841) 4 My & Cr 619; *Richardson v Hastings* (1844) 7 Beav 301; further proceedings 7 Beav 323 (action brought to recover money and assets of the partnership, of which two members had possessed themselves); *Fairthorne v Weston* (1844) 3 Hare 387. An account may be ordered against a defendant who asserts the illegality of the partnership: see PARA 152.

3 *Paynter v Houston* (1817) 3 Mer 297; *Woolley v Gordon* (1829) Taml 11.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/152. Circumstances insufficient to bar relief.

152. Circumstances insufficient to bar relief.

It is no objection to a claim for an account that the defendant partner has stolen partnership assets and has not been first prosecuted¹, or that taking the accounts involves the settlement of claims in the nature of unliquidated damages².

The court will direct an account in England of the transactions of a partnership business carried on abroad as to which settled accounts have been established in the foreign court to the jurisdiction of which it is subject, if it is shown that the English partner has not been a party to the foreign proceedings, so that they are, as to him, *res inter alios acta*³.

Although the court will not, as a rule, give its assistance to persons who carry on an illegal business, an account may be ordered against a defendant who asserts the illegality of the partnership⁴.

1 *Rooke v D'Avigdor* (1883) 10 QBD 412, DC.

2 *Bury v Allen* (1845) 1 Coll 589.

3 *Maunder v Lloyd* (1862) 2 John & H 718 (where it appeared that all the assets of the English partner were in England, so that no payment out of them could have been enforced except by proceedings upon the foreign judgment).

4 *Sheppard v Oxenford* (1855) 1 K & J 491, CA. As to the remedy of account in betting partnerships see **LICENSING AND GAMBLING**. No claim will lie for an account of a partnership in the profits of a crime: see *Everet v Williams* (1725) (the Highwaymen's Case); and see PARA 29 note 1. As to illegal partnerships generally see PARA 29 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/153. Defences to claim for an account.

153. Defences to claim for an account.

The following may be good defences to a partner's claim for an account:

- 28 (1) denial of partnership¹;
- 29 (2) illegality or fraud, or forfeiture under a power contained in the partnership agreement²;
- 30 (3) laches³;
- 31 (4) expiration of the limitation period⁴, although time does not run until the partnership is determined⁵;
- 32 (5) account stated or settled account⁶;
- 33 (6) award, release by deed⁷, or payment and acceptance of money under an agreement to an accord and satisfaction⁸.

1 As to the existence of a partnership see PARAS 4, 10 et seq.

2 *Hart v Clarke* (1854) 6 De GM & G 232; affd (1858) 6 HL Cas 633.

3 As to the effect of laches see PARA 130; and **EQUITY** vol 16(2) (Reissue) PARA 910 et seq; **LIMITATION PERIODS** vol 68 (2008) PARA 1009.

4 See the Limitation Act 1980 s 23; and **LIMITATION PERIODS** vol 68 (2008) PARAS 1008-1009. See also *Bridges v Mitchell* (1726) Gilb Ch 224; *Tatam v Williams* (1844) 3 Hare 347; *Noyes v Crawley* (1878) 10 ChD 31. An executor of a deceased partner may be barred by lapse of time (*Knox v Gye* (1872) LR 5 HL 656; *Taylor v Taylor* (1873) 28 LT 189), but, if a partnership is determined by death and the surviving partners carry on the new partnership without taking the accounts of the old and without interruption or settlement, the statutory time limit has no application as between the surviving partners and the representatives of the deceased partner (*Betjemann v Betjemann* [1895] 2 Ch 474, CA). Where the surviving partners, being the executors of their deceased partner, kept his share in the business and did not supply full information and accounts to the persons beneficially interested under his will, an account was directed against them at the suit of the beneficiaries after the lapse of 30 years (*Wedderburn v Wedderburn* (1836) 2 Keen 722; affd (1838) 4 My & Cr 41); and time will not run against the executors of a deceased partner so long as there are outstanding assets to be got in and the parties have dealt with one another upon the footing of the account being still open (*Millington v Holland* (1869) 18 WR 184). If one partner unlawfully excludes another from the management or control of the partnership property, time begins to run against a claim based on such exclusion from the act of exclusion: *Barton v North Staffordshire Rly Co* (1888) 38 ChD 458 at 463; *Clegg v Edmondson* (1857) 8 De GM & G 787.

5 See **LIMITATION PERIODS** vol 68 (2008) PARA 1009.

6 As to account stated see **CONTRACT** vol 9(1) (Reissue) PARA 1049 et seq; **EQUITY** vol 16(2) (Reissue) PARA 452. As to settled accounts see PARA 154.

7 As to what may constitute a sufficient release see *Loretto School Ltd v Macandrew and Jenkins* 1992 SLT 615 (non-partnership case); and see **CONTRACT** vol 9(1) (Reissue) PARAS 1052-1054.

8 *Brown v Perkins* (1842) 1 Hare 564. As to accord and satisfaction generally see **CONTRACT** vol 9(1) (Reissue) PARA 1043.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/154. Reopening settled accounts.

154. Reopening settled accounts.

Although a settled account¹ between the partners is a good ground of defence to a claim for an account², in special circumstances the court may reopen the accounts or give liberty to surcharge and falsify³. Settled accounts are not usually reopened in toto except upon the ground of fraud, or numerous and important errors, or mistakes affecting the whole account⁴; otherwise, the court will not usually do more than give liberty to surcharge and falsify⁵. In the absence of fraud, accounts are not reopened in favour of a party who has stood by and acquiesced in them⁶; but acquiescence in the principle of keeping an account does not amount to acquiescence in the accuracy of the items⁷.

1 A settled account is one that is agreed between the parties: see **EQUITY** vol 16(2) (Reissue) PARA 452. The fact that it has been stated that a certain sum is due and that that sum has then been paid does not necessarily constitute a settled account: *Phillips-Higgins v Harper* [1954] 1 QB 411, [1954] 1 All ER 116; affd [1954] 1 QB 411 at 420, [1954] 2 All ER 51, CA.

2 See *Davies v Davies* (1837) 2 Keen 534.

3 A single important error is sufficient, if fraudulent, to justify an order to open the whole account. If it is not fraudulent, the proper order is to give liberty to surcharge and falsify: *Gething v Keighley* (1878) 9 ChD 547 at 550; and see **EQUITY** vol 16(2) (Reissue) PARA 454. Accounts will be reopened on the ground of fraud in spite of the existence of a stringent agreement against reopening: *Oldaker v Lavender* (1833) 6 Sim 239; *Sim v Sim* (1861) 11 Ch R 310 at 321. In *Barrow v Barrow* (1872) 27 LT 431 goodwill had not been accounted for, and the account was in that respect and otherwise not in accordance with the terms of the partnership agreement. The mere fact that the claimant has already had an account rendered to him will not preclude him, in the absence of acquiescence, from having an account taken by the court: *Irvine v Young* (1823) 1 Sim & St 333; *Clements v Bowes* (1853) 1 Drew 684; *Hunter v Belcher* (1863) 9 LT 501 (on appeal (1864) 2 De GJ & Sm 194). As to reopening settled accounts see further **AGENCY** vol 1 (2008) PARA 87; **EQUITY** vol 16(2) (Reissue) PARA 453; **MISTAKE** vol 77 (2010) PARA 78.

4 *Pritt v Clay* (1843) 6 Beav 503; *M'Kellar v Wallace* (1853) 8 Moo PCC 378; *Williamson v Barbour* (1877) 9 ChD 529; *Gething v Keighley* (1878) 9 ChD 547 at 550; and see *Re Webb, Lambert v Still* [1894] 1 Ch 73 at 84, CA; cf *Maund v Allies* (1840) 5 Jur 860; *Laing v Campbell* (1865) 36 Beav 3.

5 *Gething v Keighley* (1878) 9 ChD 547. Where a valuation was held to be merely incidental to the carrying out of the purchase of a deceased partner's share by a surviving partner, as provided for in the partnership agreement, the court allowed the account to stand, subject to correction on proof of error of a clear and convincing character: *Hordern v Hordern* [1910] AC 465, PC.

6 *Scott v Milne* (1841) 5 Beav 215 (affd (1843) 7 Jur 709); *Millar v Craig* (1843) 6 Beav 433; *Cuthbert v Edinborough* (1872) 21 WR 98.

7 *Mosse v Salt* (1863) 32 Beav 269. See also *Phillips-Higgins v Harper* [1954] 1 QB 411, [1954] 1 All ER 116; affd [1954] 1 QB 411 at 420, [1954] 2 All ER 51, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/155. Basis on which accounts are framed.

155. Basis on which accounts are framed.

Accounts during the currency of a partnership must be taken according to the uniform practice of the firm¹, unless manifestly misleading², and even if contrary to the method prescribed by the partnership agreement³. Accounts framed in accordance with the firm's uniform practice but contrary to the method prescribed by the partnership agreement may well not be binding, however, upon an outgoing partner or his estate⁴. In the absence of agreement, the burden of establishing a system different from the firm's usual practice lies on the party who would gain by the varied system⁵. The executors of a deceased partner are entitled to have his share ascertained on the basis of a balance sheet as prescribed by the partnership agreement even though a balance sheet was not in fact made out at the time of his death⁶.

A partner is bound by the debit items of accounts furnished by him, although the court need not accept his items on the credit side⁷. The whole partnership assets must be included in the accounts⁸.

1 *Pettyt v Janeson* (1819) 6 Madd 146; *Simmons v Leonard* (1844) 3 Hare 581; *Coventry v Barclay* (1863) 33 Beav 1 (affd (1864) 3 De GJ & Sm 320); *Binney v Mutrie* (1886) 12 App Cas 160, PC. See also *Crosskill v Bower*, *Bower v Turner* (1863) 32 Beav 86; *Re Barber, ex p Barber* (1870) 5 Ch App 687; *Garwood v Garwood* (1911) 105 LT 231, CA. As to the form in which accounts are to be drawn up in relation to corporate partners see the Partnerships (Accounts) Regulations 2008, SI 2008/569; and as to the requirements of accounts generally see **COMPANIES** vol 15 (2009) PARA 708 et seq.

2 *Noble v Noble* 1965 SLT 415. Similarly, for the purposes of income tax, the profits of a firm must be accurately stated in its accounts (see *Odeon Associated Theatres Ltd v Jones* [1971] 2 All ER 407, [1971] 1 WLR 442; affd [1973] Ch 288, [1972] 1 All ER 681, CA). See also PARA 100. A firm's accounts may not, however, be decisive upon the question as to which assets are partnership assets: *Barton v Morris* [1985] 2 All ER 1032, [1985] 1 WLR 1257; and see PARAS 116-117, 136.

3 *Jackson v Sedgwick* (1818) 1 Swan 460; but see *Lawes v Lawes* (1878) 9 ChD 98 (oral agreement to vary the time fixed by the partnership agreement for settling accounts held not to have been intended to affect the financial interests of the partners). In the absence of special agreement, the practice of making annual rests, so as to allow interest on the balances credited to the partners, will not be continued after dissolution: *Barfield v Loughborough* (1872) 8 Ch App 1 at 7; and see **MORTGAGE** vol 77 (2010) PARA 217.

4 *Cruickshank v Sutherland* (1922) 92 LJ Ch 136, HL (where it was held that the executors of a deceased partner were entitled to have the firm's assets revalued, notwithstanding that it had been the firm's practice, contrary to the terms of the partnership agreement, to show them at book value). See *Gadd v Gadd* [2002] EWHC 107 (Ch), [2002] All ER (D) 105 (Feb) (executors of the deceased partner had the right to insist that the accounts show the current value of the asset at the date of the account as there was no evidence to indicate that the agreement had been varied by a course of dealing on the part of the partners). There is no presumption that, on a partner's death, the value of assets is to be determined by their current market value, rather than their historical costs as shown in the partnership books: *White v Minnis* [2001] Ch 393, [2000] 3 All ER 618, CA.

5 This principle was recognised where a surviving partner, who carried on the business, claimed compound interest: *Bate v Robins* (1863) 32 Beav 73. See, however, *Noble v Noble* 1965 SLT 415.

6 *Hunter v Dowling* [1893] 1 Ch 391; affd [1893] 3 Ch 212, CA.

7 *Morehouse v Newton* (1849) 3 De G & Sm 307.

8 An unsaleable asset should be valued. For example, in accounts taken upon dissolution an unassignable contract held by one partner on behalf of the firm must be retained by him and valued as an asset: *Ambler v Bolton* (1872) LR 14 Eq 427. In some cases, however, an asset of the firm cannot be accounted for or valued upon that firm's dissolution: see *Faulks v Faulks* [1992] 1 EGLR 9 (milk quota registered in the name of the

farming partnership); and see *Robertson v Brent and Haggitt* [1972] NZLR 406, NZ SC (work in progress in a solicitors' firm held not to be an asset). As to the realisation of assets on dissolution see PARA 206 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/156. Persons entitled to an account.

156. Persons entitled to an account.

Either a partner himself, or his personal representative or trustee in bankruptcy, may have an account against the other partner or his personal representative; but an assignee or mortgagee of a partner's share has no right to an account from the other partners during the continuance of the partnership, although on dissolution he becomes entitled to an account from the date of the dissolution¹. In special circumstances, strangers to the partnership are entitled to an account²; and the persons beneficially interested in the estate of a deceased partner, whose executor, being also a partner, uses the testator's assets in the business, are entitled to accounts from the executor, but not from the other partners unless they have notice of a breach of trust by the executor³. Where, however, surviving partners deal with the property of their deceased partner, knowing it to belong to his estate, they are fixed with notice of the trusts on which it is held⁴.

1 See the Partnership Act 1890 s 31; and PARA 126. As to the weak position of the assignee of a partner's share see PARA 126; and as to the position of a sub-partner see PARA 146 note 1.

2 This right was recognised in *Newland v Champion* (1748) 2 Coll 46 (separate creditor of a deceased partner was plaintiff); *Cropper v Knapman* (1836) 2 Y & C Ex 338; *Millar v Craig* (1843) 6 Beav 433; *Law v Law* (1845) 2 Coll 41 (residuary legatees obtained an account, the executors of a deceased partner having agreed to purchase the shares of the other partners); *Maunder v Lloyd* (1862) 2 John & H 718; *Pointon v Pointon* (1871) LR 12 Eq 547; cf *Taylor v Taylor* (1873) 28 LT 189.

3 In order to ascertain what profits were made from a breach of trust of this kind, Lord Eldon LC ordered the executor to produce attested copies of books in the custody of the executor's partners or agents, who were not parties to the action: *Freeman v Fairlie* (1817) 3 Mer 24, as explained in *MacDonald v Richardson, Richardson v Marten* (1858) 1 Giff 81 at 87. See also *Hue v Richards* (1839) 2 Beav 305; *Vyse v Foster* (1872) LR 13 Eq 602 (on appeal 8 Ch App 309, (1874) LR 7 HL 318).

4 *Travis v Milne, Milne v Milne* (1851) 9 Hare 141. In *Hue v Richards* (1839) 2 Beav 305 the widow of a deceased partner who was beneficially interested under his will was held entitled to production of accounts from the testator's executors, one of whom was the surviving partner; and, generally, such an action may be maintained, whether the executor is a partner or not, 'in all cases where the relation between the executors and the surviving partner is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners': *Travis v Milne, Milne v Milne* at 151 per Turner V-C. Cf *Beningfield v Baxter* (1886) 12 App Cas 167, PC; *Yeatman v Yeatman* (1877) 7 ChD 210, commenting on *Bowsher v Watkins* (1830) 1 Russ & M 277. See also *Davies v Davies* (1837) 2 Keen 534 at 539; the Partnership Act 1890 s 42(1); and PARA 131.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/157. Payment on an account.

157. Payment on an account.

In a series of monthly accounts in which the balances are not carried forward from one account to another, payment of the balance on the last account does not, it seems, bar a claim for the payment of balances on preceding accounts¹; and, when the partners, on dissolution, agree to divide the partnership property in specie, and one partner takes the whole according to a valuation, a claim by the other partner for the amount payable to him may be maintained notwithstanding that the partnership accounts remain otherwise unadjusted².

A partner may have a right of action at any time against another for a debt which is independent of the partnership accounts³.

1 *Brierly v Cripps* (1836) 7 C & P 709. One account is in the circumstances as final as any other; it is otherwise if they have been intended to form part of one general account: see *Fromont v Coupland* (1824) 2 Bing 170.

2 *Jackson v Stopherd* (1834) 2 Cr & M 361. 'There may be special bargains by which particular transactions are insulated and separated from the winding up of the concern and are taken out of the general law of partnership': *Jackson v Stopherd* at 366 per Bayley B. See also *Roxburgh Dinardo & Partners Judicial Factor v Dinardo* 1992 GWD 6-322; cf *Coffee v Brian* (1825) 3 Bing 54; *Lomas v Bradshaw* (1850) 9 CB 620.

3 *Simpson v Rackham* (1831) 5 Moo & P 612; *Worrall v Grayson* (1836) 1 M & W 166.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/158. No indebtedness between partners.

158. No indebtedness between partners.

Partners are not, as regards partnership dealings, considered as debtor and creditor between themselves until the concern is wound up or until there is a binding settlement of the accounts¹; but, where exceptionally a partner has repeatedly requested the taking of an account and this has been refused, that partner may be entitled to sue his co-partners in respect of a specific debt owed to him qua partner without such an account having been taken². Subject to this, it follows that one partner has no right of action against another for the balance owing to him until after final settlement of the accounts³; and money lent to a partnership by a partner cannot be recovered in a common law claim for money lent⁴. This rule applies only in relation to persons who are currently partners; and, once a partner has left the partnership leaving the other partners to continue the firm's business on their own account, as, for example, where the outgoing partner has retired or has been expelled, his former partners are creditors to him in respect of any part of his partnership share or other agreed entitlement as has not been paid out to him⁵.

1 *Clark v Glennie* (1820) 3 Stark 10; *Bovill v Hammond* (1827) 6 B & C 149; *Richardson v Bank of England* (1838) 4 My & Cr 165; *Carr v Smith* (1843) 5 QB 128; *Meyer and Co v Faber (No 2)* [1923] 2 Ch 421, CA. The authority of a partner who is appointed to wind up the partnership affairs extends to settlement of the necessary accounts: see *Luckie v Forsyth* (1846) 3 Jo & Lat 388.

2 *Prole v Masterman* (1855) 21 Beav 61 (where, although the principles enunciated in the case mirror the arguments applicable as between partners (ie until an account has been taken, the true position between the partners cannot be seen), this case actually concerned directors of an old-style railway company).

3 *Smith v Barrow* (1788) 2 Term Rep 476; *Fromont v Coupland* (1824) 2 Bing 170; *Prole v Masterman* (1855) 21 Beav 61; *Weston v Abrahams* (1869) 20 LT 586. The situs of such cause of action when the business has been carried on by partners resident in different jurisdictions is at the principal place of business: see *Luchmeechund v Mull* (1860) 3 LT 603.

4 *Green v Hertzog* [1954] 1 WLR 1309, CA. Money so lent can only be recovered in proceedings for taking accounts under the Partnership Act 1890 s 44: see PARA 212.

5 See the Partnership Act 1890 s 43; and PARAS 5, 82, 135. See also *Sobell v Boston* [1975] 2 All ER 282, [1975] 1 WLR 1587; *Gopala Chetty v Vijayaraghavachariar* [1922] 1 AC 488; *Brown v Rivlin* [1983] CA Transcript 56.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/159. Effect of dissolution and settlement of accounts.

159. Effect of dissolution and settlement of accounts.

Dissolution and mutual settlement of accounts are sufficient consideration for an implied promise to pay the balance found to be due on the taking of the account and no express promise is necessary to support a claim for payment¹.

¹ *Rackstraw v Imber* (1816) Holt NP 368 (continuing partner sought unsuccessfully to attach conditions to his payment); *Moravia v Levy* (1786) 2 Term Rep 483n (where, however, there was an express promise to pay); *Foster v Allanson* (1788) 2 Term Rep 479 at 483; cf *Wray v Milestone* (1839) 5 M & W 21; and see generally **CONTRACT** vol 9(1) (Reissue) PARA 1049.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/160. Payment into court of sums due.

160. Payment into court of sums due.

When it can be shown that a certain sum will be found due upon the taking of a partnership account, that sum may be ordered to be paid into court¹. Money shown to have been received by a partner improperly, or in breach of agreement or good faith, will be ordered to be paid into court².

1 *Richardson v Bank of England* (1838) 4 My & Cr 165 (motion refused on the ground that the defendant not only did not admit the accuracy of the account but disputed numerous items in it); *Gaskell v Chambers* (1858) 26 Beav 360; *London Syndicate v Lord* (1878) 8 ChD 84 at 87, CA, per Jessel MR; *Freeman v Cox* (1878) 8 ChD 148 (defendant admitted that he had the firm's money in his hands); *Wanklyn v Wilson* (1887) 35 ChD 180; *Hollis v Burton* [1892] 3 Ch 226, CA (admission made in error allowed to be withdrawn, but upon the terms that money be paid into court); *Re Beeny, Ffrench v Sproston* [1894] 1 Ch 499 (the admission may be oral); *Neville v Matthewman* [1894] 3 Ch 345, CA; *Nutter v Holland* [1894] 3 Ch 408, CA. Cf *Creak v Capell* (1821) 6 Madd 114 (motion for payment in refused pending the hearing of objections); *Toulmin v Copland* (1837) 3 Y & C Ex 625; *Gretzer v Heimann* [1929] WN 244 (order refused where, although the money was admittedly partnership assets, the court was not satisfied that it belonged to the plaintiff).

2 *Jervis v White* (1802) 6 Ves 738; *Foster v Donald* (1820) 1 Jac & W 252, followed in *Birley v Kennedy* (1865) 6 New Rep 395; *Costeker v Horrox* (1839) 3 Y & C Ex 530; *Re Benson, Elletson v Pillers* [1899] 1 Ch 39. Money received by a partner on account of, and during the currency of, the partnership is not money received in a fiduciary capacity, and a partner is not liable to attachment under the Debtors Act 1869 s 4(3) (see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 485) for disobeying an order to pay into court money in his hands belonging to the partnership: *Piddocke v Burt* [1894] 1 Ch 343; and see PARA 106 note 1; and **EQUITY** vol 16(2) (Reissue) PARA 854.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iii) Order for Accounts/161. Costs of partnership accounts.

161. Costs of partnership accounts.

As a general rule, the costs of taking accounts are payable out of the partnership assets¹. Negligence or other misconduct by a partner may render him liable for the costs of a claim as far as it has been occasioned by such misconduct². If the partnership assets are not sufficient to pay the costs, the partners must contribute in proportion to their shares after adjusting their rights in other respects³. Thus, partnership debts and liabilities, including debts and balances due to partners by the firm in respect of advances, take priority over the costs⁴.

1 *Butcher v Pooler* (1883) 24 ChD 273, CA. An order for payment of costs out of the assets is a discretionary order and is not appealable: *Butcher v Pooler* at 280 per Bowen LJ; *Jones v Welch* (1855) 1 K & J 765; *Bonville v Bonville* (1865) 35 Beav 129; *Newton v Taylor* (1874) LR 19 Eq 14 (accounts settled under an award, in pursuance of an arbitration clause contained in the partnership agreement, and the costs made payable out of the assets and in the same proportions as if the accounts had been taken by the court); *Hamer v Giles, Giles v Hamer* (1879) 11 ChD 942; *Austin v Jackson* (1879) 11 ChD 942n.

2 *Norton v Russell* (1875) LR 19 Eq 343 (defendant who had admitted default in rendering accounts, although there was no allegation or denial that anything was due from him, ordered to pay costs up to the hearing); *Hamer v Giles, Giles v Hamer* (1879) 11 ChD 942. In *Dean v MacDowell* (1878) 8 ChD 345, CA, the plaintiffs obtained an account of alleged secret profits by a partner in another business, and by a supplemental claim sought not only those profits but the partner's whole interest in the business. The first claim was dismissed but without costs as the defendant's conduct had been blameworthy; the second claim was dismissed with costs as wholly unfounded. See also PARA 172 note 9.

3 *Ross v White* [1894] 3 Ch 326, CA.

4 *Potter v Jackson* (1880) 13 ChD 845 (balance owing to a partner for rent of property occupied by the firm and for capital advanced by him); *Rosher v Crannis* (1890) 63 LT 272 (funds had been voluntarily brought in, after dissolution by a partner); cf *Davy v Scarth* [1906] 1 Ch 55 (partner who had been appointed receiver held to be entitled to payment of his remuneration and costs in that capacity, although he was unable to pay a sum which he owed to his firm). As to the order of application of assets on a dissolution see the Partnership Act 1890 s 44(b); and PARA 212.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iv) Receivers/162. Jurisdiction to appoint a receiver or manager.

(iv) Receivers

162. Jurisdiction to appoint a receiver or manager.

The court may by order, whether interim or final, appoint a receiver¹ in all cases in which it appears to the court to be just and convenient to do so², on the application of any partner, whether claimant or defendant³, or of other persons interested in the preservation of the partnership assets, such as the personal representatives of a deceased partner⁴, especially where the surviving partner fails to get in the assets⁵. The court also has jurisdiction to appoint a manager⁶. The function of a manager is to carry on the partnership business under the direction of the court; a receiver does not have this power unless he is also appointed manager⁷. The jurisdiction may be exercised even where there is an agreement for reference to arbitration⁸.

1 Where the only substantial asset of a partnership is a freehold property which is already subject to a charge (the amount secured exceeding the value of the property itself), the court has no power to impose another charge upon that property in priority to the existing charge in order to secure the receiver's expenses and remuneration: *Choudhri v Palta* [1992] BCC 787, CA. As to a receiver's power to sell the assets of the partnership over which he has been appointed see *Murray v King* [1986] FSR 116, Aust Fed Ct (firm's copyright in the magazine which it published). As to receivers generally see **RECEIVERS** vol 39(2) (Reissue) PARA 314. Cf **COMPANIES** vol 15 (2009) PARAS 1340 et seq, 1361 et seq; **MORTGAGE** vol 77 (2010) PARA 560 et seq.

2 Supreme Court Act 1981 s 37(1). Any such order may be made either unconditionally or on such terms and conditions as the court thinks just: s 37(2). See further **RECEIVERS** vol 39(2) (Reissue) PARA 313. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt I para 1. At the date at which this volume states the law no such day had been appointed.

3 *Katsch v Schenck* (1849) 18 LJ Ch 386.

4 *Davis v Amer* (1854) 3 Drew 64.

5 *Estwick v Conningsby* (1682) 1 Vern 118.

6 See eg *Lees v Jones* (1857) 3 Jur NS 954; *Sargant v Read* (1876) 1 ChD 600.

7 See *Re Manchester and Milford Rly Co, ex p Cambrian Rly Co* (1880) 14 ChD 645 at 653, CA; *Taylor v Neate* (1888) 39 ChD 538 at 543; and **RECEIVERS** vol 39(2) (Reissue) PARA 482 et seq.

8 *Machin v Bennett* [1900] WN 146; and see *Plews v Baker* (1873) LR 16 Eq 564; *Law v Garrett* (1878) 8 ChD 26, CA; *Pini v Roncoroni* [1892] 1 Ch 633; PARA 183; and **ARBITRATION**.

UPDATE

162 Jurisdiction to appoint a receiver or manager

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iv) Receivers/163. Circumstances justifying appointment of receiver before dissolution.

163. Circumstances justifying appointment of receiver before dissolution.

Unless proceedings have been instituted for the dissolution¹ and winding up of the partnership, or for relief which will necessarily involve such dissolution and winding up², the courts are generally reluctant to order the appointment of a receiver and manager in respect of a subsisting partnership³. Even where a partnership has not been dissolved and there are no such proceedings on foot, an application for the appointment of a receiver simpliciter, as opposed to that for a receiver and manager, may, however, be more sympathetically viewed by the courts⁴.

Further, and notwithstanding such general reluctance of the courts, it would appear that, where special grounds exist for the appointment of a receiver or receiver and manager, such appointment may be ordered. Misconduct by one or more partners plus jeopardy to partnership assets is, therefore, a ground for the appointment of a receiver before dissolution⁵. Where a partner is guilty of stealing the partnership assets⁶ or where a surviving partner insists on continuing the business with the assets of a deceased partner⁷, or fails to get in the outstanding debts, or otherwise acts to the prejudice of the assets⁸, or where an acting partner denies the other partner's right to relief on the ground that the partnership is illegal and claims the whole property for himself⁹, or where a new firm extends the credit of the debtors of the old firm and declines to press them for payment¹⁰, the courts may be more willing to order the appointment of a receiver or receiver and manager in respect of a subsisting partnership. Likewise, where a partner wrongfully seeks to exclude his co-partner¹¹ or where he acts in breach of the terms of an agreement under which the partners agreed that a third party is to act in the winding up of the firm, the partners having divested themselves of this right¹², or has acted fraudulently towards his co-partners¹³, the courts may be more willing to appoint a receiver or receiver and manager in respect of a subsisting partnership.

Where the existence or the prior dissolution of the partnership is disputed and the appointment of a receiver or receiver and manager is sought in interim proceedings before the court has had an opportunity to ascertain whether a partnership exists or whether its dissolution has been effected, as the case may be, although the court will have jurisdiction to make such appointment, it will be reluctant to do so if such appointment would cause irreparable damage to the firm¹⁴. Likewise, where it is contended that the partnership is illegal¹⁵, the court is generally reluctant in interim proceedings to order the appointment of a receiver or receiver and manager. Where, however, the prospects of such a contention succeeding are small, the court may be more willing to grant such an order¹⁶.

The nature of the partnership business and the size of the partnership will also be factors which the court will take into consideration in deciding how to exercise its discretion. Thus, in relation to professional firms, the court will be especially sensitive to the damage which may be caused by the publicity which the appointment of a receiver or receiver and manager usually entails¹⁷. Conversely, it will be easier to obtain such an appointment in relation to a small firm since such an appointment will affect fewer persons than it will in the case of a large firm¹⁸.

Where some of the partners have become alien enemies, a receiver and manager will generally be appointed¹⁹.

The court will not appoint a receiver for a purpose, neither authorised nor assented to by the partners, which it could not authorise one partner to carry out against the will of the others²⁰.

1 As to the position after dissolution, where the courts will generally appoint a receiver or receiver and manager and almost as a matter of course, see PARA 209 note 7. Dissolution alone was not formerly considered sufficient ground for the appointment of a receiver without some breach of duty (*Harding v Glover* (1810) 18 Ves 281) but this view is not consistent with later cases which seem to show that, in the case of a dissolved partnership, the appointment of a receiver is almost a matter of course: see *Sobell v Boston* [1975] 2 All ER 282 at 286, [1975] 1 WLR 1587 at 1590 per Goff J. As to dissolution see PARA 174 et seq.

2 See *Sheppard v Oxenford* (1855) 1 K & J 491 (where various forms of relief usually associated with dissolution were sought, although dissolution itself was not expressly claimed); *Evans v Coventry* (1854) 5 De GM & G 911 (revsg 3 Drew 75).

3 *Hall v Hall* (1850) 12 Beav 414; *Roberts v Eberhardt* (1853) Kay 148; and see *Oliver v Hamilton* (1794) 2 Anst 453; *Waters v Taylor* (1808) 15 Ves 10; *Carlen v Drury* (1812) 1 Ves & B 154; *Lawson v Morgan* (1815) 1 Price 303; *Harrison v Armitage* (1819) 4 Madd 143; *Goodman v Whitcomb* (1820) 1 Jac & W 589; *Marshall v Colman* (1820) 2 Jac & W 266; *Richards v Davies* (1831) 2 Russ & M 347; *Smith v Jeyes* (1841) 4 Beav 503; *Rowlands v Evans* (1861) 30 Beav 302. Where there has been a dissolution of the partnership caused by the death of the partners but the partners' personal representatives have carried on the partnership business, a receiver or receiver and manager will more readily be appointed, since there is not the same mutual confidence between partners' personal representatives as between partners themselves: *Phillips v Atkinson* (1787) 2 Bro CC 272. In a mining partnership a receiver has been refused against a tenant in common, where the plaintiff had stood by and the mine proved profitable, and the defendant had incurred expenditure (*Norway v Rowe* (1812) 19 Ves 144; and see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARAS 368-369); and an application for the appointment of a receiver has been refused against a partner who was also an unsatisfied mortgagee (*Rowe v Wood* (1822) 2 Jac & W 553). Nor will mere disagreement and want of co-operation between the partners constitute sufficient ground for the appointment of a receiver: *Roberts v Eberhardt* (1853) Kay 148. Cf *Jefferys v Smith* (1820) 1 Jac & W 298.

4 *Const v Harris* (1824) Turn & R 496. However, in *Hall v Hall* (1850) 3 Mac & G 79 at 90, Lord Truro LC said of *Const v Harris* that it was a peculiar case since the receiver had simply a duty to perform, which might be considered purely ministerial, namely to receive the entrance money of a theatre and to apply it according to the previous arrangement between the parties until the hearing of the cause.

5 *Evans v Coventry* (1854) 5 De GM & G 911 (revsg 3 Drew 75); *Sheppard v Oxenford* (1855) 1 K & J 491; *Carlen v Drury* (1812) 1 Ves & B 154.

6 *Oliver v Hamilton* (1794) 2 Anst 453; *Medwin v Ditcham* (1882) 47 LT 250 (where, in an action for an injunction to restrain the defendant from drawing out of partnership funds more than the stipulated amount, and for a receiver, a receiver was appointed pending a reference to arbitration, even though there was no claim for dissolution of partnership); and see *Smith v Jeyes* (1841) 4 Beav 503 (where a partner was accused of diverting partnership funds).

7 *Madgwick v Wimble* (1843) 6 Beav 495.

8 *Estwick v Conningsby* (1682) 1 Vern 118. See also *Young v Buckett* (1882) 30 WR 511 (where it was held that the fact that the surviving partner was endeavouring to divert the goodwill of the business to himself was sufficient ground for the appointment of a receiver and manager at the instance of the representative of the deceased partner).

9 *Hale v Hale* (1841) 4 Beav 369 (where a receiver was appointed notwithstanding the fact that no misconduct was alleged as against the defendant partner).

10 *Collenridge v Cook* (1837) 1 Jur 771.

11 *Wilson v Greenwood* (1818) 1 Swan 471; *Blakeney v Dufaur* (1851) 15 Beav 40; and see the judgment of Long Innes J in *Tate v Barry* (1928) 28 SRNSW 380 at 387 with which Megarry J concurred in *Floydd v Cheney*, *Cheney v Floydd* [1970] Ch 602 at 610, [1970] 1 All ER 446 at 451, 452. See also *Tibbits v Phillips* (1853) 1 WR 163 (where a manager was appointed).

12 *Davis v Amer* (1854) 3 Drew 64; and see *Turner v Major* (1862) 3 Giff 442 (where an injunction was held to be a sufficient remedy). Such grounds will exist only where the partners have already agreed to dissolve and wind up the firm, so that the courts will in any event be more willing to appoint a receiver and manager: see note 1; and PARA 209. As to the partners' personal right to wind up the firm see PARA 164.

13 See *Re Hooper, ex p Broome* (1811) 1 Rose 69.

14 For cases where the existence of a partnership was disputed see *Floydd v Cheney*, *Cheney v Floydd* [1970] Ch 602, [1970] 1 All ER 446; *Peacock v Peacock* (1809) 16 Ves 49; *Chapman v Beach* (1820) 1 Jac & W 594; *Hardy v Hardy* (1917) 62 Sol Jo 142; *Bowker v Henry* (1862) 6 LT 43 (where the defendant did not admit

the partnership and claimed to own the whole business and the court refused to appoint a receiver upon the defendant's interlocutory motion for the appointment until that question had been determined). For cases where it was disputed that the partnership had yet been dissolved see *Fairburn v Pearson* (1850) 2 Mac & G 144 (where the motion for the appointment of a receiver was refused and an issue was directed for trial whether the partnership had been dissolved); *Wilson v Greenwood* (1818) 1 Swan 471; *Blakeney v Dufaur* (1851) 15 Beav 40 (where both partners were alleging that the partnership had been dissolved, albeit on different grounds, and a receiver was appointed until sale); *Madgwick v Wimple* (1843) 6 Beav 495 (where the court declined to decide whether a receiver should be appointed, opportunity being given to the parties to negotiate, although the Master of the Rolls did indicate that, should the parties be unable to agree, he would be minded to appoint a receiver); *Lawson v Morgan* (1815) 1 Price 303; *Baxter v West* (1858) 28 LJ Ch 169.

15 As to illegal partnerships generally see PARA 29 et seq.

16 *Hale v Hale* (1841) 4 Beav 369; and see *Sheppard v Oxenford* (1855) 1 K & J 491.

17 *Floydd v Cheney*, *Cheney v Floydd* [1970] Ch 602, [1970] 1 All ER 446; *Sobell v Boston* [1975] 2 All ER 282, [1975] 1 WLR 1587.

18 *Hall v Hall* (1850) 3 Mac & G 79.

19 *Feldt v Chamberlain* (1914) 58 Sol Jo 788; *Re Bechstein's Business Trusts*, *Berridge v Bechstein*, *London County and Westminster Bank v Bechstein* (1914) 58 Sol Jo 864; *Rombach v Rombach* (1914) 59 Sol Jo 90; *Armitage v Borgmann* (1914) 84 LJ Ch 784; *Kupfer v Kupfer* (1915) 60 Sol Jo 221; but see *Maxwell v Grunhut* (1914) 31 TLR 79, CA, followed in *Re Gaudig and Blum*, *Spalding v Lodde* (1915) 31 TLR 153 (where it was held that there is no jurisdiction to appoint a receiver and manager to protect the property of an alien enemy on the application of his local agent and an application for the appointment of a receiver was refused).

20 *Niemann v Niemann* (1889) 43 ChD 198 at 202, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iv) Receivers/164. Appointment of partner as receiver.

164. Appointment of partner as receiver.

Since the right of a solvent partner to wind up the affairs of the partnership is a personal right belonging to him qua partner¹, an order for the appointment of a receiver² often gives liberty to each partner to propose himself as receiver³; and a solvent partner will ordinarily be appointed receiver for the purposes of winding up the affairs of the firm where the other partners are bankrupt and there is no reason for distrusting him⁴. In such a case the court will direct him to give security, furnish accounts and allow access to and inspection of the partnership books by the trustee in bankruptcy, and may order him to pay balances in excess of a stated amount into court or into a joint bank account of himself and the trustee. Similarly, the court will appoint a receiver on the application of the trustee of a bankrupt partner as against the purchaser of the share of a solvent partner⁵. A retired partner who is liable for the debts of the firm may be appointed receiver⁶.

1 See the Partnership Act 1890 s 38; and PARA 52.

2 Reference is made here to a partner being appointed as a receiver, but a partner may also be appointed as a manager of the partnership business; and such reference is to be construed accordingly: see PARA 162.

3 *Blakeney v Dufaur* (1851) 15 Beav 40; cf *Sargant v Read* (1876) 1 ChD 600; *Pini v Roncoroni* [1892] 1 Ch 633 at 637; 1 Seton's Judgments and Orders (7th Edn) 729. See also *Bloomer v Currie* (1907) 51 Sol Jo 277.

4 *Re Upperton, ex p Stoveld* (1823) 1 Gl & J 303; *Collins v Barker* [1893] 1 Ch 578. Where some of the partners are alien enemies, a claim by one of them to get in the debts of the firm is prima facie not maintainable; but, if the claim is in substance that of the receiver appointed by the court for this purpose, then it is not prohibited by the trading with the enemy legislation (see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 576), and is maintainable: *Rombach Baden Clock Co v Gent & Son* (1915) 84 LJB 1558, following *Mercedes Daimler Motor Co Ltd v Maudslay Motor Co Ltd* (1915) 31 TLR 178.

5 *Fraser v Kershaw* (1856) 2 K & J 496.

6 *Hoffman v Duncan* (1853) 18 Jur 69.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(iv) Receivers/165. Powers, liability and remuneration of receiver and manager.

165. Powers, liability and remuneration of receiver and manager.

A receiver and manager carrying on the partnership business pending sale¹ may enter into such new contracts as are necessary for carrying on the business in the mode usual in the particular trade². A receiver is not the agent of the partnership, but acts on his own responsibility, and incurs personal liability for orders given and contracts made by him, subject to a right of indemnity out of the assets in respect of all proper transactions³. However, a receiver appointed by the court has no right of indemnity against the partners personally⁴.

Interference with a receiver is a contempt of court⁵, and may be restrained by injunction⁶ or punished by committal⁷.

A receiver may only charge for his services if the court so directs and specifies the basis on which the receiver is to be remunerated⁸. There is no fixed rule with regard to the amount of remuneration of a receiver and manager; and each case depends upon its own circumstances⁹. A partner appointed receiver with remuneration is entitled to be paid even though he is indebted to the firm¹⁰.

In the absence of an express covenant, a receiver and manager who is *functus officio* will not be restrained from carrying on a similar business on his own account¹¹.

1 As to a receiver's power to sell to one of the partners of the firm an asset that had been vested in both partners as partnership property see *Murray v King* [1986] FSR 116, Aust Fed Ct (firm's copyright).

2 *Taylor v Neate* (1888) 39 ChD 538 at 543, where, however, a limit for the amount of such contracts was fixed which the receiver might not exceed without the consent of the partners or the court. It is not unusual to limit a period during which a receiver and manager may act as manager, with liberty to apply to the court on the expiration of that period: see **RECEIVERS** vol 39(2) (Reissue) PARA 482.

3 *Burt, Boulton and Hayward v Bull* [1895] 1 QB 276, CA; *Boehm v Goodall* [1911] 1 Ch 155; cf **COMPANIES** vol 15 (2009) PARA 1370.

4 *Boehm v Goodall* [1911] 1 Ch 155. As to the effect of payments by a receiver on the running of time under the Limitation Act 1980 see **LIMITATION PERIODS** vol 68 (2008) PARA 1198.

5 *Freeland v Stansfeld* (1854) 2 Sm & G 479; *Helmore v Smith (2)* (1886) 35 ChD 449, CA (former clerk sent a circular soliciting business to customers of the firm); *King v Dopson* (1911) 56 Sol Jo 51 (circulars were issued to the effect that the original undertaking was no longer carried on); *Re Bechstein's Business Trusts, Berridge v Bechstein, London County and Westminster Bank v Bechstein* (1914) 58 Sol Jo 864 (letters sent stating that it was unpatriotic to do business with the firm). Judgment creditors who levy execution against property of which a receiver has been appointed without the permission of the court are guilty of contempt: *Lane v Sterne* (1862) 3 Giff 629; *Defries v Creed* (1865) 13 WR 632. In a proper case the court will give liberty to the receiver to pay the judgment debt (*Mitchell v Weise, ex p Friedheim* [1892] WN 139) or give the applicants a charging order on the assets (*Armstrong v Paris* (1888) 4 TLR 247), or make an order in the form settled in *Kewney v Attrill* (1886) 34 ChD 345, the effect of which is to give the applicants priority over the general body of creditors (see *Newport v Pougher* [1937] Ch 214, [1937] 1 All ER 276, CA).

6 *Dixon v Dixon* [1904] 1 Ch 161; cf *Kitcat v Sharp* (1882) 31 WR 227.

7 *King v Dopson* (1911) 56 Sol Jo 51. As to the procedure for committal see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 493.

8 See CPR 69.7; *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 9; *Capewell v HM Revenue and Customs Comrs* [2007] UKHL 2, [2007] 2 All 370, [2007] 1 WLR 386; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1506.

9 *Day v Croft* (1840) 2 Beav 488; *Prior v Bagster* (1887) 57 LT 760; *Harris v Sleep* [1897] 2 Ch 80, CA; and see PARA 111. See also **RECEIVERS** vol 39(2) (Reissue) PARA 439.

10 *Davy v Scarth* [1906] 1 Ch 55.

11 *Re Irish, Irish v Irish* (1888) 40 ChD 49.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(v) Injunctions/A. INJUNCTIONS IN A GOING CONCERN/166. Jurisdiction to grant an injunction.

(v) Injunctions

A. INJUNCTIONS IN A GOING CONCERN

166. Jurisdiction to grant an injunction.

The court may by order, whether interim or final, grant an injunction in all cases in which it appears to the court to be just and convenient to do so¹; and the court will grant an injunction, at the instance of a partner, to restrain any other partner from acting contrary to the obligations imposed upon him by the partnership relationship, whether such acts are an actual breach of express stipulations or a breach of that good faith which is the implied duty of every partner².

1 See the Supreme Court Act 1981 s 37(1). Any such order may be made either unconditionally or on such terms and conditions as the court thinks just: s 37(2). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt I para 1. At the date at which this volume states the law no such day had been appointed. As to the jurisdiction of county courts see **CIVIL PROCEDURE** vol 11 (2009) PARA 345. It must be just as well as convenient: *Beddow v Beddow* (1878) 9 ChD 89 at 93 per Jessel MR; *Day v Brownrigg* (1878) 10 ChD 294 at 307, CA, per Jessel MR; and see **CIVIL PROCEDURE** vol 11 (2009) PARA 349.

2 As to the duty of good faith see PARA 106.

UPDATE

166 Jurisdiction to grant an injunction

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(v) Injunctions/A. INJUNCTIONS IN A GOING CONCERN/167. Position of partner claiming injunction.

167. Position of partner claiming injunction.

A person claiming an injunction against partners who have excluded him from the management of the firm¹ must naturally show that he is a partner and not an employee of the firm², and must be in a position to perform his own part of the partnership agreement³. Thus, an application for an injunction to restrain another partner from receiving or dealing with partnership property, founded on charges of misconduct, will be refused if the claimant has himself acted improperly⁴; and the acquiescence of one partner in acts similar to that complained of may also disentitle him to relief against his co-partners⁵.

1 As to the right of each partner to participate in the firm see PARA 110.

2 *Walker v Hirsch* (1884) 27 ChD 460, CA.

3 *Smith v Fromont* (1818) 2 Swan 330; *Const v Harris* (1824) Turn & R 496 at 524.

4 *Littlewood v Caldwell* (1822) 11 Price 97 (plaintiff had improperly taken away the partnership books).

5 *Glassington v Thwaites* (1823) 1 Sim & St 124 at 131; and see *Powell v Allarton* (1835) 4 LJ Ch 91; **CIVIL PROCEDURE** vol 11 (2009) PARAS 467, 468; **EQUITY** vol 16(2) (Reissue) PARA 560.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(v) Injunctions/A. INJUNCTIONS IN A GOING CONCERN/168. When a claim for dissolution is necessary.

168. When a claim for dissolution is necessary.

In the case of a partnership for a fixed term, it is not necessary that a partner who claims an injunction should also claim a dissolution¹; but, as a general rule, an interim injunction is not granted unless the claimant can show facts of such gravity as would, if proved at the trial, entitle him to a dissolution². Mere squabbles and improprieties arising from incompatibility of temper are insufficient; there must be some definite act amounting to breach of faith, breach of the partnership agreement, illegality or insolvency, or such gross misconduct as to imperil the business or prevent it from being properly conducted³.

The exclusion of one partner by the others from the management of the business will be restrained by injunction, even if dissolution is not claimed⁴; but, if the partnership is one at will⁵, the court may be more reluctant to interfere unless dissolution is also sought, for the defendant might immediately put an end to the partnership⁶. If, however, the act is one which tends towards the destruction of the partnership property, an injunction will be granted notwithstanding that dissolution is not sought⁷.

1 *Fairthorne v Weston* (1844) 3 Hare 387; *Richardson v Hastings* (1844) 7 Beav 301 (further proceedings 7 Beav 323); *Watney v Trist* (1876) 45 LJ Ch 412. As to fixed term partnerships see PARA 43.

2 *Smith v Jeyes* (1841) 4 Beav 503.

3 *Waters v Taylor* (1808) 15 Ves 10; *Goodman v Whitcomb* (1820) 1 Jac & W 589; *Marshall v Colman* (1820) 2 Jac & W 266; *Anderson v Anderson* (1857) 25 Beav 190; *Lemann v Berger* (1876) 34 LT 235.

4 *Hall v Hall* (1850) 12 Beav 414. In *Anon* (1856) 2 K & J 441 a dissolution was claimed.

5 As to the meaning of 'partnership at will' see PARA 43.

6 *Peacock v Peacock* (1809) 16 Ves 49; *Miles v Thomas* (1839) 9 Sim 606 at 609; but see *Floydd v Cheney, Cheney v Floydd* [1970] Ch 602, [1970] 1 All ER 446 (where Megarry J held that there was no evidence of a partnership at will as the defendant contended but that, even if the partnership had been one at will, he would still have granted the injunction sought, namely against making improper use of partnership papers).

7 *Miles v Thomas* (1839) 9 Sim 606 (injunction refused, there being no danger of the subject matter in dispute being lost).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(v) Injunctions/A. INJUNCTIONS IN A GOING CONCERN/169. Grounds for injunction.

169. Grounds for injunction.

A partner may be restrained by injunction from a breach of the partnership agreement¹. He may also be restrained from entering into a new partnership with others for carrying on a business of the same nature and character as the old partnership before the expiration of the term of the old partnership, from publishing notices of dissolution, and from using the firm name of the old partnership in his new business². Injunctions will be granted to restrain him from carrying on a business on his own account in the firm name³, or with partnership assets⁴, or against the wishes of his partners⁵, or from using the assets of the firm in a separate business carried on for his own benefit⁶, or from altering the partnership property without the consent of his partners⁷, or from drawing, accepting or negotiating bills of exchange for his own purposes in the name of the firm⁸. He will be restrained from such conduct in the management of the business as would render it impossible for the business to be carried on in a proper manner, or would cause irreparable injury to it⁹. An injunction will not, however, be granted in respect of matters not falling within the express or implied obligations of the partnership agreement¹⁰; nor in respect of a possible breach of the partnership agreement which may never happen at all and cannot happen until a future period¹¹.

1 *Morris v Colman* (1812) 18 Ves 437.

2 *England v Curling* (1844) 8 Beav 129.

3 *Aas v Benham* [1891] 2 Ch 244, CA.

4 *Turner v Major* (1862) 3 Giff 442; *Clements v Norris* (1878) 8 ChD 129, CA.

5 *Blachford v Hawkins* (1823) 1 LJOS Ch 141.

6 *Gardner v M'Cutcheon* (1842) 4 Beav 534. See also *Glassington v Thwaites* (1823) 1 Sim & St 124, where all the partners were proprietors of a morning newspaper and had agreed not to be concerned in any other morning newspaper, and some of them afterwards became proprietors of an evening newspaper, and a general injunction to restrain competition, applied for by a partner interested in the morning newspaper only, was refused, the mere temptation of his partners to betray their duty to the morning newspaper not being sufficient ground for interference to such extent by the court; but a limited injunction was granted to restrain his partners from publishing in the evening newspaper news obtained at the expense of the firm before such news had appeared in the morning newspaper. See also *Turner v Major* (1862) 3 Giff 442.

7 *Elmslie v Beresford* [1873] WN 152.

8 Holders with notice may also be restrained from negotiating such bills: *Hood v Aston* (1826) 1 Russ 412. See also *Jervis v White* (1802) 7 Ves 413.

9 *Anderson v Wallace* (1826) 2 Mol 540; *Francis v Spittle* (1840) 9 LJ Ch 230.

10 *Glassington v Thwaites* (1823) 1 Sim & St 124.

11 *Coates v Coates* (1821) 6 Madd 287.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(v) Injunctions/A. INJUNCTIONS IN A GOING CONCERN/170. Injunction against third person.

170. Injunction against third person.

Partners may obtain an injunction to restrain a trader from carrying on business so as to suggest, contrary to the fact, that he is their partner or agent and so expose them to a risk of litigation or liability¹.

¹ *Routh v Webster* (1847) 10 Beav 561; *Walter v Ashton* [1902] 2 Ch 282. Apart from some express stipulation, a person has no right to hold out his late partner, or indeed anyone else, as his partner in business; and, if it could be shown that the defendants were holding out the claimants as their partners, the claimants would be entitled to an injunction: see *Burchell v Wilde* [1900] 1 Ch 551 at 563, CA, per Lindley MR. As to the legal capacity of a firm to sue see PARA 79. As to the partners' right to use the firm name after dissolution see PARA 213 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(v) Injunctions/B. INJUNCTIONS IN RELATION TO DISSOLUTION/171. Injunctions ancillary to dissolution.

B. INJUNCTIONS IN RELATION TO DISSOLUTION

171. Injunctions ancillary to dissolution.

During a claim for dissolution¹, the court will interfere by injunction, if necessary or desirable, to preserve the assets², or to restrain any act by a partner which would interfere with the rights of the other partners, or with the systematic and equitable winding up of the business, by causing loss or depreciation of the assets or otherwise, as, for example, where a partner is suffering from a mental disorder³.

A partner will be restrained from carrying on the business except for the purpose of winding it up⁴; from carrying on a branch of the partnership business with partnership assets for his own benefit⁵; from getting in debts owing to the firm⁶, or other assets, if he has dealt, or is likely to deal, improperly with them⁷; or from selling his share to a stranger if his partners are entitled, by contract, to an option to buy it⁸.

A partner will be restrained from taking undue advantage of his legal title to eject a partner, or the personal representatives of a deceased partner, from property held by him in trust for the firm⁹, or from applying the firm's assets for his own purposes, for example from dealing with a partnership lease as his own property¹⁰. Thus, the executors of a deceased partner may be restrained from dealing with a renewed lease otherwise than as partnership property¹¹.

An injunction will be granted to restrain a partner from removing the partnership books from the place of business and keeping them elsewhere, even though it amounts to an order to bring them back¹².

The court will restrain the publication of a trade secret where the information has been obtained through a partner's breach of contract or duty¹³.

1 As to claims for dissolution see PARA 182.

2 See *Investment and Pensions Advisory Service Ltd v Gray* [1990] BCLC 38 (where a firm's provisional liquidator obtained an injunction (subsequently varied) against a partner of the insolvent firm in order to preserve sums that had allegedly been wrongly paid to the partner during the currency of the partnership).

3 *Anon* (1856) 2 K & J 441; *J v S* [1894] 3 Ch 72. See also *Jones v Lloyd* (1874) LR 18 Eq 265; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 607.

4 *De Tastet v Bordenave* (1822) Jac 516.

5 *Turner v Major* (1862) 3 Giff 442; and see *Re David and Matthews* [1899] 1 Ch 378 at 382.

6 *Read v Bowers* (1793) 4 Bro CC 441.

7 *Hartz v Schrader* (1803) 8 Ves 317; *O'Brien v Cooke* (1871) 5 IR Eq 51.

8 *Homfray v Fothergill* (1866) LR 1 Eq 567.

9 *Hawkins v Hawkins* (1858) 4 Jur NS 1044; and see *Sykes v Land* (1984) 271 Estates Gazette 1264, CA; cf *Brenner v Rose* [1973] 2 All ER 535, [1973] 1 WLR 443.

10 *Elliot v Brown* (1791) 3 Swan 489n; *Keech v Sandford* (1726) Sel Cas Ch 61; *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 All ER 1239, [1974] 1 WLR 605; *Chan v Zacharia* (1983) 154 CLR 178 (new lease

of the partnership premises which had been acquired by a partner whilst the firm was being wound up held by him upon a constructive trust on behalf of his co-partners); and see PARA 107.

11 *Alder v Fouracre* (1818) 3 Swan 489; and see *Re Biss, Biss v Biss* [1903] 2 Ch 40 at 57, 61, CA. The landlord will not, however, be restrained from granting the renewed lease.

12 *Greatrex v Greatrex* (1847) 1 De G & Sm 692. As to the right of a partner to the partnership books see the Partnership Act 1890 s 24(9); and PARA 136.

13 *Morison v Moat* (1851) 9 Hare 241; affd (1852) 21 LJ Ch 248 (defendant was a volunteer). *Morrison v Moat* was followed and applied in the following cases of employer and employee or principal and agent: *Tuck & Sons v Priester* (1887) 19 QBD 629, CA; *Lamb v Evans* [1893] 1 Ch 218, CA; *Robb v Green* [1895] 2 QB 315, CA. In relation to non-partnership cases see also *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, [1986] 1 All ER 617, CA (and the cases there cited); *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1960] RPC 128, CA; *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA; *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41; *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1982] 2 All ER 321, CA; *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101; *C R Smith Glaziers (Dunfermline) Ltd v Jamieson* 1992 GWD 14-789; and see **EQUITY** vol 16(2) (Reissue) PARA 855. Different considerations would arise if the defendant were a purchaser for value of the secret without notice of any obligations affecting it: *Morison v Moat* above at 263; and see **CIVIL PROCEDURE** vol 11 (2009) PARA 436; **EMPLOYMENT** vol 39 (2009) PARAS 55-59. An injunction to restrain publication, by a partner, of a book explaining a patent which belonged to the partnership was, however, refused, as publication was not likely to injure or endanger the patent: *Blachford v Hawkins* (1823) 1 LJOS Ch 141.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(v) Injunctions/B. INJUNCTIONS IN RELATION TO DISSOLUTION/172. Injunctions after dissolution.

172. Injunctions after dissolution.

An injunction will not generally be granted restraining a partner from using the old firm's name after dissolution if the firm's assets are divided between the partners, because each of them is entitled to use the firm name¹. This rule only applies subject to contrary agreement, and unless it exposes the other partners to risk of liability². Whether this danger exists depends upon the circumstances of the case³. A surviving partner must not carry on a rival business so as to lead to the belief that it is the partnership business, and so appropriate the goodwill of the business, but the court has refused to restrain a surviving partner who was also executor and trustee of a deceased partner from carrying on a similar business⁴.

Where, on dissolution, the goodwill of the business becomes the property of one of the partners, another partner will not be restrained from stating that he was formerly a partner in the old firm, but he will be restrained from using the name of the firm so as to suggest that he is carrying on the old business⁵; and a continuing partner who has purchased the assets but not the goodwill may be restrained from using, in the style of the firm, the name of his former partner⁶.

If two partners have agreed that, on dissolution of the partnership, the goodwill is to belong solely to one of them, the other will be restrained from doing anything calculated to depreciate its value⁷.

If a partner who has sold his share of the business to his partners has undertaken not to compete with them, he will, unless the undertaking is void as being in restraint of trade⁸, be restrained by injunction from acting contrary to his undertaking⁹. Where, however, a vendor has aided his wife in subsequently commencing a similar business with her own property, the court may refuse to restrain the vendor from breach of an agreement not to carry on or be interested in any similar business¹⁰.

1 *Banks v Gibson* (1865) 34 Beav 566; and see PARA 213 et seq. As to the firm name see PARA 7. It would appear, however, that before the winding up of the firm has been completed (ie the assets have been sold or distributed amongst the partners and a final account has been taken and agreed between the partners) partners will not be permitted to use the old firm's name on their own account, unless authorised by their co-partners, since to do so would prima facie constitute a breach of the duty of good faith and/or the duty not to make secret profits and/or the duty not to compete with the firm (see PARAS 106-109), obligations which continue by virtue of the Partnership Act 1890 s 38 (see PARA 52), notwithstanding the firm's dissolution. See also PARA 198.

2 *Webster v Webster* (1791) 3 Swan 490n; and see PARA 213 et seq.

3 *Burchell v Wilde* [1900] 1 Ch 551 at 564, CA (held that the risk was not substantial in any business sense); *Townsend v Jarman* [1900] 2 Ch 698; and see *Chappell v Griffith* (1885) 53 LT 459; *Gray v Smith* (1889) 43 ChD 208, CA. Cf *Lewis v Langdon* (1835) 7 Sim 421 (injunction granted against the executor of a deceased partner); *Hill v Fearis* [1905] 1 Ch 466. See also *Levy v Walker* (1879) 10 ChD 436, CA.

4 *Davies v Hodgson* (1858) 25 Beav 177 at 182, 183; *Re David and Matthews* [1899] 1 Ch 378 at 383. Where a surviving partner bought his deceased partner's share of the trade property from his executors, a legatee of a share of the deceased partner's goodwill was held not entitled to enforce a sale of the goodwill: *Robertson v Quiddington* (1860) 28 Beav 529.

5 *Hookham v Pottage* (1872) 8 Ch App 91; cf *Matthews v Hodson* (1886) 2 TLR 899, CA. He may advertise his disassociation from a part of the firm's business, but not that that part will close: *Bradbury v Dickens* (1859) 27 Beav 53. As to the use of the firm name after dissolution see PARA 213 et seq.

6 *Scott v Rowland* (1872) 20 WR 508.

7 As to a partner's right to goodwill after dissolution and restrictions on his co-partner's right to solicit old customers see *Trego v Hunt* [1896] AC 7, HL; *Darby v Meehan* (1998) Times, 25 November; and PARA 213 note 9.

8 As to the enforceability of covenants in restraint of trade see PARA 42; and **COMPETITION** vol 18 (2009) PARA 377 et seq.

9 *Turner v Evans* (1852) 2 De GM & G 740; *Williams v Williams* (1818) 2 Swan 253; *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266, [1954] 1 WLR 815, CA; cf *Clifford v Phillips* (1907) 51 Sol Jo 748; *Way v Bishop* [1928] Ch 647, CA (covenant not to practise as a solicitor within a limited area held not to have been broken by acting as managing clerk at a fixed salary to a solicitor within the area). In *Dayer-Smith v Hadsley* (1913) 108 LT 897, CA (affd [1914] AC 979, HL) an injunction was granted to restrain the defendant who had opened an office just outside the prohibited area but carried on business within such area. Likewise, a breach of a mere undertaking not to compete, upon which an arbitrator has acted in fixing the price of the goodwill, has been restrained upon the ground of fraud and bad faith, although the award was silent with regard to the restriction: *Harrison v Gardner* (1817) 2 Madd 198. In *Dean v MacDowell* (1878) 8 ChD 345, CA, it was held that, there having been no loss suffered by the covenantee, no action for damages could be maintained (see at 352 per James LJ) and that the remedy for breach of a covenant not to engage in business except for the benefit of the partnership is by claim for an injunction or dissolution; and that a claim for an account of profits made in the business which is not a competing business cannot be maintained, nor can the business itself be claimed as part of the partnership assets. See also PARA 161 note 2. As to a partner's obligation to account for secret profits see PARA 107.

10 *Smith v Hancock* [1894] 2 Ch 377, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/3. RELATIONS BETWEEN PARTNERS/(10) ENFORCEMENT OF PARTNERS' RIGHTS BETWEEN THEMSELVES/(v) Injunctions/B. INJUNCTIONS IN RELATION TO DISSOLUTION/173. Injunctions against partners who purchase shares.

173. Injunctions against partners who purchase shares.

Where a partner has agreed to buy his partner's share of the business, the court may refuse, pending a claim for specific performance of the agreement, to restrain him from publishing the accounts of the business with a view to its resale to a company¹. If a partner who has agreed to buy his partner's share carries on the business with the whole assets without paying the purchase money, the vendor's remedy is not by an injunction to prevent the other from demolishing the property sold, nor by way of declaration that the vendor retains a lien on the property, but by a claim for an account, unless the purchaser commits acts of waste².

1 *Marshall v Watson* (1858) 25 Beav 501.

2 *Cofton v Horner* (1818) 5 Price 537. As to orders for account see PARA 150 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4.
DISSOLUTION/(1) DISSOLUTION OTHERWISE THAN BY THE COURT/174. Dissolution on notice.

4. DISSOLUTION

(1) DISSOLUTION OTHERWISE THAN BY THE COURT

174. Dissolution on notice.

Subject to any agreement between the partners¹, a partnership entered into for an undefined time and for no fixed adventure or undertaking may be dissolved by any partner by giving notice to the others of his intention to dissolve the partnership². The Partnership Act 1890 does not require the notice to be in writing³. The partnership is then dissolved as from the date mentioned in the notice as the date of dissolution⁴ or, if no date is so mentioned, as from the date of the communication of the notice⁵. The notice must amount to an unambiguous intimation of a final intention to dissolve the partnership⁶, and must be given to all the partners unless the partnership agreement otherwise provides⁷.

A notice duly given cannot be withdrawn without the consent of the partner receiving it⁸. If, however, the partner receiving the notice is suffering from a mental disorder⁹, the notice, although it remains valid, may be withdrawn¹⁰. If the partnership deed requires dissolution by deed only, a submission to arbitration by deed of all matters in dispute, followed by an arbitration award by deed vesting the partnership assets in one partner as trustee for the purpose of winding up the business, is a sufficient compliance with the partnership deed¹¹. In some cases, dissolution of the partnership may be effected without any notice¹².

1 See *Moss v Elphick* [1910] 1 KB 465; affd [1910] 1 KB 846, CA (agreement that the partnership was to be terminated by mutual arrangement only held to be an agreement within the meaning of the Partnership Act 1890 s 32 so that the partnership could not be dissolved by the service of a notice of dissolution by one partner where the other partner had not assented to such notice); *Abbott v Abbott* [1936] 3 All ER 823; and see *Walters v Bingham*, *Bingham v Walters* [1988] 1 FTLR 260, following *Moss v Elphick* (where a resolution was passed at a partners' meeting whereby it was agreed between the partners that the partnership would continue upon the terms of a draft partnership agreement, notwithstanding that the draft was expressed to continue only for a fixed period, pending the execution of a new deed of partnership; the partnership was held not to be for an undefined term within the meaning of the Partnership Act 1890 s 32, so that it could not be dissolved by notice). See also *Chahal v Mahal* [2005] EWCA Civ 898, [2005] 2 BCLC 655 (dissolution of a partnership at will by parties agreeing to transfer assets to a limited company); and PARA 180.

2 Partnership Act 1890 ss 26(1), 32(c). As to partnerships of fixed duration and partnerships for fixed adventures or undertakings see PARAS 43 et seq, 175. See also *Peacock v Peacock* (1809) 16 Ves 49; *Crawshay v Maule* (1818) 1 Swan 495 at 508; *Heath v Sansom* (1832) 4 B & Ad 172 at 175; *Miles v Thomas* (1839) 9 Sim 606 at 609. The Partnership Act 1890 s 32 does not apply to a partnership at will arising after a fixed term contract has expired: see *Maillie v Swanney* 2000 SLT 464, OH.

If the business has been carried on upon property belonging to one partner and there has been no lease of that property to the firm, any right of occupation which the partner had ceases upon the dissolution; but it is apprehended that the owning partner will not be able to terminate the other partners' licences to occupy where this would prevent the orderly winding up of the firm: see the Partnership Act 1890 s 38; *Harrison-Broadley v Smith* [1964] 1 All ER 867 at 872, [1964] 1 WLR 456 at 465, CA, per Harman LJ; *IRC v Graham's Trustees* 1971 SLT 46 at 48, HL, per Lord Reid; cf *Doe d Colnaghi v Bluck* (1838) 8 C & P 464; *Benham v Gray* (1847) 5 CB 138. As to partnership property and the property of partners see PARA 116 et seq.

Since the basis of the relationship between partners is contractual (see PARA 1 note 1), a partnership agreement may, on normal principles, also be brought to an end by virtue of an agreed dissolution or by rescission of the partnership agreement on the ground of fraud or misrepresentation (see the Partnership Act 1890 s 41; and PARA 148). However, it is now doubted whether a partnership can be dissolved by one or more partners accepting a repudiatory breach on the part of other partners: see the dicta of Lord Millett in *Hurst v Bryk* [2002] 1 AC 185 at 193-196, [2000] 2 All ER 193 at 198-202, HL; cited with approval in *Mullins v Laughton* [2002]

EWHC 2761 (Ch), [2003] Ch 250, [2003] 4 All ER 94 (accepted repudiatory breach did not operate to dissolve the partnership).

3 Since the Partnership Act 1890 does not require the notice to be in writing, the expressions 'the giving of notice' and 'the receipt of notice' are to be preferred to the more limited expression 'service of notice'.

4 This presupposes that the date mentioned in the notice is later than the date upon which the notice is given to the other partners, since the Partnership Act 1890 s 26(1) refers to the partnership being dissolved 'on giving notice . . . to all the other partners' (emphasis supplied). A retrospective notice of dissolution is thus not possible, at least without the other partners' agreement.

5 Partnership Act 1890 s 32. A partnership at will is dissolved, in the absence of previous notice, from the date of service, not from the date of issue, of the writ in a claim for dissolution: *Unsworth v Jordan* [1896] WN 2. Since after dissolution accounts are taken between the partners, no partner may reap an unfair advantage by giving what was termed 'unseasonable' notice of dissolution: *Featherstonhaugh v Fenwick* (1810) 17 Ves 298 at 309; cf *Chavany v Van Sommer* (1770) 1 Swan 512n.

6 Cf *Parsons v Hayward* (1862) 4 De GF & J 474; *Steuart v Gladstone* (1878) 10 ChD 626 at 650, CA.

7 *Van Sandau v Moore* (1826) 1 Russ 441; *Wheeler v Van Wart* (1838) 9 Sim 193. It takes effect on the giving of notice: see *McLeod v Dowling* (1927) 43 TLR 655 (partnership dissolved by death before notice received by surviving partner).

8 *Jones v Lloyd* (1874) LR 18 Eq 265. A fortiori if there accrues to the recipient of the notice an option to purchase the share of the retiring partner (*Warder v Stilwell* (1856) 3 Jur NS 9); nor will a valid notice become inoperative owing to an irregularity in the mode of taking the accounts consequent upon it (*Steuart v Gladstone* (1878) 10 ChD 626 at 654, CA). The parties may, however, waive a valid notice by a subsequent agreement: *Laycock v Bulmer* (1844) 13 LJ Ex 156.

9 As to dissolution where a partner is suffering from mental disorder see PARA 184; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 607, 759. As to a partner becoming incapable of managing partnership affairs see the Partnership Act 1890 s 35(b); and PARAS 184-185.

10 *Robertson v Lockie* (1846) 15 Sim 285; *Mellersh v Keen* (1859) 27 Beav 236.

11 *Hutchinson v Whitfield* (1830) Hayes 78.

12 *Bagshaw v Parker* (1847) 10 Beav 532 (partnership determinable on a specified event which happened); *Pearce v Lindsay* (1860) 3 De GJ & Sm 139 (after disputes and attempted settlement of accounts, a long correspondence as to items of account ensued, without any reference to new business or continuing connection).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4.
DISSOLUTION/(1) DISSOLUTION OTHERWISE THAN BY THE COURT/175. Dissolution at fixed time or on completion of an adventure.

175. Dissolution at fixed time or on completion of an adventure.

A partnership for a fixed term, or for a single adventure or undertaking, is dissolved by the expiration of the term¹ or by the termination of the adventure or undertaking², as the case may be, except so far as it is deemed to continue for the purpose of winding up its affairs³. Agreement may be made to the contrary⁴. Alternatively, dissolution may take place prematurely, for example on death⁵.

1 See the Partnership Act 1890 s 32(a); and PARA 43. As to partnerships for a fixed term see PARA 43.

2 Partnership Act 1890 s 32(b). As to partnerships for a single adventure or undertaking see PARA 43. See also *Re Abbey Leisure Ltd* [1990] BCC 60, CA (company formed to undertake single venture).

3 See the Partnership Act 1890 s 38; and PARAS 52, 198. As to the continuation of a partnership beyond the fixed term without any express new agreement see s 27; and PARA 44.

4 Partnership Act 1890 s 32.

5 See PARA 176.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4.
DISSOLUTION/(1) DISSOLUTION OTHERWISE THAN BY THE COURT/176. Dissolution on death.

176. Dissolution on death.

Subject to any agreement between the partners, a partnership is dissolved as regards all the partners by the death of any partner¹. If a partner gives a valid notice of a dissolution but dies before the receipt or the expiration of the notice, the partnership is dissolved by the death and not by the notice².

Unless the partnership agreement otherwise provides, neither the surviving partners nor the personal representatives of a deceased partner are entitled or bound to continue a partnership, even if the partnership term is unexpired at the time of the death³.

The estate of a partner who dies is not liable for partnership debts contracted after the date of the death⁴, and no notice of the death is necessary⁵ in order to determine the deceased's liability. Where goods are ordered before, but delivered after, the death of a partner, the debt accrues on the delivery of the goods, and the vendor, although he had no notice of the death, cannot, therefore, make the estate of the deceased partner liable for the price⁶.

1 Partnership Act 1890 s 33(1); *Crawshay v Collins* (1808) 15 Ves 218 at 227; *Vulliamy v Noble* (1817) 3 Mer 593 at 614; *Crawshay v Maule* (1818) 1 Swan 495 at 508. Note, however, the case of a partnership formed for the purpose of effecting a specific undertaking or object, where it is often possible to infer an agreement that the partnership is not to dissolve upon the death of a partner but is to continue until the completion of that undertaking or object: see PARA 133 text and note 1. As to the devolution of partnership property on death and the rights incidental to it see PARA 122; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 338. If a partner lives until his death in a house forming part of the partnership property, being debited yearly with a sum of money in the firm books as rent, there is no tenancy in his personal representative, since any tenancy which existed determined on the dissolution of the partnership by his death: *Lee v Crawford* (1912) 46 ILT 81. As to the position where, following a firm's dissolution, the immediate termination of a partner's licence to occupy will prevent the orderly winding up of the firm see PARA 174 note 2.

2 *Bell v Nevin* (1866) 15 WR 85; *McLeod v Dowling* (1927) 43 TLR 655 (death took place before the receipt of the notice by the other partner).

3 *Pearce v Chamberlain* (1750) 2 Ves Sen 33; *Gillespie v Hamilton* (1818) 3 Madd 251; and see *Lancaster v Allsup* (1887) 57 LT 53; *Emberson v Fisher* [1944] OR 241, [1944] 2 DLR 572, Ont CA.

4 Partnership Act 1890 s 36(3). As to the liability of personal representatives for existing debts of a deceased partner see *Patel v Patel* [2007] All ER (D) 276 (Dec), CA (where debt was found to be not a partnership debt but a simple debt and was statute barred because it accrued more than six years before the proceedings were begun).

5 *Devaynes v Noble, Houlton's Case* (1816) 1 Mer 529 at 616; *Vulliamy v Noble* (1817) 3 Mer 593 at 614; *Crawshay v Maule* (1818) 1 Swan 495 at 508. As to the effect of dissolution, by death or otherwise, on contracts with persons employed by the firm see PARAS 18, 198; and **CONTRACT** vol 9(1) (Reissue) PARA 903; **EMPLOYMENT** vol 40 (2009) PARA 689.

6 *Friend v Young* [1897] 2 Ch 421 at 429 (contract of agency held to be determined by the death of a partner in the agent's firm); *Bagel v Miller* [1903] 2 KB 212, DC. See also the Partnership Act 1890 s 9; PARA 74; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 780. As to the effect of the death of the principal on a contract of agency see **AGENCY** vol 1 (2008) PARA 188.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(1) DISSOLUTION OTHERWISE THAN BY THE COURT/177. Dissolution on bankruptcy or making of charging order.

177. Dissolution on bankruptcy or making of charging order.

Subject to any agreement between the partners, a partnership is dissolved as regards all the partners by the bankruptcy of any partner¹, and the estate of the bankrupt thereupon ceases to be liable for the partnership debts incurred after the bankruptcy².

If a charging order is made³ upon a partner's share in respect of his separate debt, the other partners may at their option dissolve the partnership⁴.

1 Partnership Act 1890 s 33(1). As to insolvent partnerships generally see PARAS 99, 233; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 817 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1166-1301. See further *Re Houghton and Watts, ex p Robinson* (1833) 3 Deac & Ch 376. It is the adjudication and not the presentation of the petition which dissolves the partnership: *Ex p Smith* (1800) 5 Ves 295. The rule that, on the bankruptcy of one partner, the firm is dissolved was, before the Partnership Act 1890, held not to apply to mining partnerships: *Re Borron, ex p Broadbent* (1834) 1 Mont & A 635 at 638; *Bentley v Bates* (1840) 4 Y & C Ex 182. These cases were, however, criticised in *Dodds v Preston* (1888) 59 LT 718, CA, and such cases seem now to be covered by the Partnership Act 1890 s 33(1). As to the effect of bankruptcy on the authority of a partner see s 38; and PARA 52.

2 Partnership Act 1890 s 36(3). A proviso forfeiting a partner's share on his bankruptcy is void: *Whitmore v Mason* (1861) 2 John & H 204; and see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 423.

3 See under the Partnership Act 1890 s 23(2): see PARA 95 et seq.

4 Partnership Act 1890 s 33(2); and see *Brown, Janson & Co v Hutchinson & Co* [1895] 1 QB 737 at 738, CA, per Lindley LJ. See also PARA 98; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 685; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1166.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4.
DISSOLUTION/(1) DISSOLUTION OTHERWISE THAN BY THE COURT/178. Dissolution on
illegality.

178. Dissolution on illegality.

A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for members of the firm to carry it on in partnership¹.

¹ Partnership Act 1890 s 34; *Griswold v Waddington* 15 Johns 57 (1818) (affd 16 Johns 438 (1819)); *Esposito v Bowden* (1857) 7 E & B 763, Ex Ch; *Hudgell Yeates & Co v Watson* [1978] QB 451, [1978] 2 All ER 363, CA. As to illegal partnerships generally see PARA 29 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(1) DISSOLUTION OTHERWISE THAN BY THE COURT/179. Dissolution on expulsion.

179. Dissolution on expulsion.

A power of expulsion conferred by a partnership agreement¹ is strictly construed and must be exercised by all the partners whose concurrence may be necessary under the partnership agreement². The power of expulsion must also be exercised in the utmost good faith³. It is questionable to what extent a partner whom it is proposed to expel is entitled to an opportunity to meet the case against him or to explain his conduct⁴.

An expulsion clause may survive the expiry of a fixed-term partnership where the partners continue the partnership as partners at will⁵.

Where, by the terms of the partnership agreement, a partner may be expelled only for cause, that is to say, if one or more of the grounds which, as specified in the partnership agreement, entitle the other partners to exercise a power of expulsion, can be shown to exist, the court will scrutinise the expelled partner's behaviour so as to ascertain whether such cause existed⁶.

Whether the court will require the expelling partners to specify the grounds for expulsion if, by the terms of the partnership agreement, no reasons for such expulsion are required to be given or shown, and whether the court will scrutinise the expelled partner's behaviour in order to ascertain whether such specified grounds are made out, is less clear⁷.

1 Such a power is created only by express agreement, since it is not implied by law: see the Partnership Act 1890 s 25; and PARA 110.

2 *Smith v Mules* (1852) 9 Hare 556 at 570; *Re A Solicitors' Arbitration* [1962] 1 All ER 772, [1962] 1 WLR 353 (single partner unable to expel others), followed in *Bond v Hale* (1969) 72 SRNSW 201, CA; and see *Blisset v Daniel* (1853) 10 Hare 493; *Clark and Chapman v Hart* (1858) 6 HL Cas 633; *Russell v Russell* (1880) 14 ChD 471; *Fisher v Jackson* [1891] 2 Ch 84 at 93-94. This will not, however, be taken to absurd limits: *Hitchman v Crouch Butler Savage Associates* (1983) 127 Sol Jo 441, CA (clause in a partnership deed that required the senior partner to sign all expulsion notices held not to apply when it was the senior partner himself whom it was sought to expel).

3 *Barnes v Youngs* [1898] 1 Ch 414; *Carmichael v Evans* [1904] 1 Ch 486. It must not be exercised for the exclusive benefit of one or more partners individually, but for the benefit of the whole partnership: *Blisset v Daniel* (1853) 10 Hare 493 at 522; and see *Steuart v Gladstone* (1878) 10 ChD 626 at 650. As to the necessity for good faith between partners see PARA 106 et seq.

4 Although it was held in *Blisset v Daniel* (1853) 10 Hare 493 at 530, 531 per Sir Page Wood V-C that the partners should not have gone behind the plaintiff expelled partner's back, it is clear that this finding was prompted by the actions of one of the partners (Vaughan) who, in breach of his duty of good faith, sought to have the plaintiff expelled for his (Vaughan's) own ulterior motives and had coerced the other two partners into concurring in the plaintiff's expulsion, and that, had it not been for this element of bad faith, the expelling partners would not have been held to be under an obligation to give the plaintiff a hearing before expelling him. See, however, *Steuart v Gladstone* (1878) 10 ChD 626 (where Fry J appeared to elide the duty of good faith which must be exercised in expelling a partner with a duty to give the expelled partner an opportunity to be heard); *Wood v Woad* (1874) LR 9 Exch 190 (mutual insurance society); but see *Russell v Russell* (1880) 14 ChD 471 (where it was held, distinguishing *Blisset v Daniel* above and *Wood v Woad*, that, in the case of a two-partner firm where one partner is given an express and exclusive power to dissolve the partnership, there is no obligation, before exercising such power, to give the other partner an opportunity to be heard, sed quaere to what extent this is authority for the proposition in the case of a true expulsion). *Blisset v Daniel* and *Wood v Woad* have also been distinguished from a case in which the power of expulsion arose not by reason of 'misconduct or suspicion under some general provision' but by reason of the breach of a specific provision, namely that no partner should directly or indirectly enter into any other business: *Cooper v Page* (1876) 34 LT 90 at 92, 93 per Hall V-C.

Whatever uncertainties may have previously existed in relation to the partners' duty or otherwise to give a partner whom it is proposed to expel a hearing, these were removed in *Green v Howell* [1910] 1 Ch 495, CA (albeit concerning merely a two-partner firm so that the expulsion in question actually caused its general dissolution), overruling Romer J in *Barnes v Youngs* [1898] 1 Ch 414, who had held that such an obligation did exist, and distinguishing the cases of *Wood v Woad*, *Steuart v Gladstone* and *Blisset v Daniel*.

Notwithstanding *Green v Howell* above, the view that a partner whom it is proposed to expel should be given a hearing seems to be finding favour in New Zealand: see *Wilkie v Wilkie (No 2)* (1900) 18 NZLR 734; *Jackson v Moss* [1978] NZ Recent Law 28; *Re Northwestern Autoservices Ltd* [1980] 2 NZLR 302, NZ CA (company case). Whether this trend is reflected in England has yet to be determined; in *Kerr v Morris* [1987] Ch 90, [1986] 3 All ER 217, CA, the question was left open.

5 le under the Partnership Act 1890 s 27: see PARA 44. See *Walters v Bingham, Bingham v Walters* [1988] 1 FTLR 260 (where Sir Nicholas Brown-Wilkinson V-C declined to follow *Clark v Leach* (1863) 1 De GJ & Sm 409, holding that in modern partnerships with many partners, a power of expulsion is not necessarily inconsistent with a partnership at will arising after the expiry of a fixed-term partnership). As to fixed term partnerships and partnerships at will see PARA 43.

6 See *Carmichael v Evans* [1904] 1 Ch 486 at 492; *Green v Howell* [1910] 1 Ch 495, CA; *Peyton v Mindham* [1971] 3 All ER 1215 at 1220, [1972] 1 WLR 8 at 13; *Fulwell v Bragg* (1983) 127 Sol Jo 171 (decision at an interlocutory hearing). It is unclear whether, if by the terms of the partnership agreement reasons must be given for expelling a partner and no or no satisfactory or accurate grounds are given at the time of a partner's expulsion, but such grounds are discovered subsequently, these latter grounds may be relied upon by the expelling partners: see *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA.

7 See *Kerr v Morris* [1987] Ch 90 at 110, 111, [1986] 3 All ER 217 at 228, CA, obiter per Dillon LJ (expelling partners must specify a reason for expelling a partner and prima facie such reason must be a reasonable one, even though in the partnership agreement under consideration no reason had to be given). It is submitted that this view is inconsistent with authority: see *Price v Bouch* (1986) 53 P & CR 257; *Re Gresham Life Assurance Society, ex p Penney* (1872) 8 Ch App 446; *Berry and Stewart v Tottenham Hotspur Football and Athletic Co Ltd* [1935] Ch 718; sed quaere.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(1) DISSOLUTION OTHERWISE THAN BY THE COURT/180. Implied agreement to dissolve partnership.

180. Implied agreement to dissolve partnership.

Whilst partners are clearly free to expressly agree to dissolve a partnership, there may also be circumstances which indicate that there has been an implied agreement between the partners to bring the partnership to an end¹. For example, where the partners agree to transfer the assets of the partnership to a limited company, it will be inferred, in the absence of other evidence, that they intended to dissolve the partnership². Such an agreement will not, however, be inferred if the transaction was merely intended as a tax avoidance scheme³.

It is doubted whether an implied agreement to dissolve the partnership will be inferred where one or more partners accepts a repudiatory breach on the part of other partners⁴.

1 See the Partnership Act 1890 s 32 (which is expressed to be 'subject to any agreement between the partners'); and PARA 174. 'A partnership may . . . be dissolved by mutual agreement, and it may be objected that this is not mentioned [in the Partnership Act 1890] either; but in fact it is catered for by s 19 taken in conjunction with s 32(2)(a)': *Hurst v Bryk* [2002] 1 AC 185 at 195, [2000] 2 All ER 193 at 201, HL, per Lord Millett. The Partnership Act 1890 s 19 provides that the 'mutual rights and duties of partners . . . may be varied by the consent of all the partners' and adds that 'such consent may be either expressed or inferred from a course of dealing': see s 19; and *Chahal v Mahal* [2005] EWCA Civ 898 at [20], [2005] 2 BCLC 655 at [20] per Neuberger LJ.

2 *Chahal v Mahal* [2005] EWCA Civ 898, [2005] 2 BCLC 655 (where, on the facts, there was no implied agreement to dissolve the firm). 'The law . . . would presume, in the absence of any reason to the contrary, that the transfer of all the business and assets of a partnership to a limited company, in which all the partners are given shares pro rata to their interests in the partnership, raises the presumption that the partnership is thereby determined': *Chahal v Mahal* at [29] per Neuberger LJ.

3 *National Westminster Bank plc v Jones* [2001] 1 BCLC 98, [2000] NPC 73.

4 See the dicta of Lord Millett in *Hurst v Bryk* [2002] 1 AC 185 at 193-196, [2000] 2 All ER 193 at 198-202, HL; cited with approval in *Mullins v Laughton* [2002] EWHC 2761 (Ch), [2003] Ch 250, [2003] 4 All ER 94 (accepted repudiatory breach did not operate to dissolve the partnership). See also PARA 174.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4.
DISSOLUTION/(2) DISSOLUTION BY THE COURT/(i) Proceedings for Dissolution/181.
Jurisdiction.

(2) DISSOLUTION BY THE COURT

(i) Proceedings for Dissolution

181. Jurisdiction.

The courts¹ which have jurisdiction to dissolve a partnership² in England and Wales are:

- 34 (1) the High Court of Justice, to the Chancery Division of which all causes and matters for the dissolution of partnerships or the taking of partnership accounts are specially assigned³;
- 35 (2) a county court where either the whole assets of the partnership do not exceed £30,000 in amount or value⁴, or where the parties by memorandum agree that the court is to have jurisdiction⁵;
- 36 (3) the Court of Protection under the Mental Capacity Act 2005⁶, although generally applications to dissolve partnerships ought not to be made to the Court of Protection unless a receiver has been appointed and there is no substantial issue to be tried.

1 'Court' in the Partnership Act 1890 includes every court and judge having jurisdiction in the case: s 45.

2 Such a jurisdiction clearly exists only if what it is sought to be wound up is really a partnership, and parties cannot confer jurisdiction upon the court by estoppel: *Re C & M Ashberg* (1990) Times, 17 July (where the individual in question merely allowed himself to be held out as a partner). As to holding out see PARA 24 et seq; and see *Walker v Hirsch* (1884) 27 ChD 460, CA (where it was held that the plaintiff who received both a salary and a share of profits (as well as being liable for a share of the losses of the firm) was not a partner and was not therefore entitled to wind up the firm). Even where it is found that the litigants are partners in the true sense of the word, however, so that the court does have jurisdiction, at the request of one of them, to wind up the firm, the court will not necessarily be obliged to accede to such a request and may refuse to do so where the partner seeking the firm's winding up has, by the terms of the partnership agreement (and somewhat unusually), no proprietary interest in the capital and assets of the firm: see *Stekel v Ellice* [1973] 1 All ER 465, [1973] 1 WLR 191. As to the issue whether a partnership exists and, if so, who are the partners of it see PARA 10 et seq; and see *Sobell v Boston* [1975] 2 All ER 282, [1975] 1 WLR 1587; and PARA 167.

3 Supreme Court Act 1981 s 61, Sch 1 para 1(f); and see **COURTS** vol 10 (Reissue) PARA 611. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt I para 1. At the date at which this volume states the law no such day had been appointed. As to the origin of the growth of the exclusive jurisdiction of equity see **EQUITY** vol 16(2) (Reissue) PARA 463.

4 County Courts Act 1984 s 23(f); County Court Jurisdiction Order 1981, SI 1981/1123, art 2, Table; and see **COURTS** vol 10 (Reissue) PARA 710 et seq. The 'whole assets' would appear to refer to the gross and not net assets of a firm, since these are the assets with which the court will have to deal when winding up a firm. The court has jurisdiction whether or not the existence of the partnership is in dispute: County Courts Act 1984 s 23(f); and see *R v Judge Lailey, ex p Koffman* [1932] 1 KB 568, CA (where it was held that the jurisdiction extended to an action where the existence of the partnership was denied). As to transfers between the Chancery Division and a county court see **COURTS** vol 10 (Reissue) PARA 610; **CIVIL PROCEDURE** vol 11 (2009) PARA 69.

5 See the County Courts Act 1984 s 24(1), (2); and **COURTS** vol 10 (Reissue) PARA 719.

6 See the Mental Capacity Act 2005 ss 16, 18(1)(e); PARA 184; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 759.

UPDATE

181 Jurisdiction

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4.
DISSOLUTION/(2) DISSOLUTION BY THE COURT/(i) Proceedings for Dissolution/182.
Commencement of proceedings.

182. Commencement of proceedings.

Proceedings for the dissolution of a partnership are started in the usual way by the court¹ issuing a claim form at the request of the claimant².

1 As to the courts with jurisdiction see PARA 181.

2 See CPR Pt 7; and **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq. As to the alternative procedure for claims see CPR Pt 8; and **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(2) DISSOLUTION BY THE COURT/(i) Proceedings for Dissolution/183. Reference to arbitration.

183. Reference to arbitration.

The right of a partner to claim a dissolution by the court may be controlled by an arbitration clause contained in the partnership agreement¹. Whether the matters in dispute fall within the clause is a question for the court to decide² unless the parties have expressly agreed to leave it to the arbitrator³. If such a clause applies to all matters in dispute between the parties, the arbitrators have power to award a dissolution⁴.

Upon the application of the defendant to the court⁵, the court must grant a stay of proceedings unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed⁶.

1 As to the inclusion of arbitration clauses in partnership agreements generally see PARA 41. An arbitration clause will normally be a term that will, under the Partnership Act 1890 s 27 (see PARA 44), survive the expiry of a fixed-term partnership: *Gillett v Thornton* (1875) LR 19 Eq 599; and see *Morgan v William Harrison Ltd* [1907] 2 Ch 137; and PARA 44.

2 *Piercy v Young* (1879) 14 ChD 200, CA; *Vawdrey v Simpson* [1896] 1 Ch 166; *Renshaw v Queen Anne Residential Mansions Co Ltd* [1897] 1 QB 662; *Barnes v Youngs* [1898] 1 Ch 414; *Parry v Liverpool Malt Co* [1900] 1 QB 339, CA; *Olver v Hillier* [1959] 2 All ER 220, [1959] 1 WLR 551; *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, [1977] 1 WLR 713, HL (German partnership agreement).

3 *Willesford v Watson* (1873) 8 Ch App 473; *Gillett v Thornton* (1875) LR 19 Eq 599 at 605. See also *Hackston v Hackston* 1956 SLT (Notes) 38.

4 *Russell v Russell* (1880) 14 ChD 471, approved in *Walmsley v White* (1892) 40 WR 675, CA; *Vawdrey v Simpson* [1896] 1 Ch 166; *Phoenix v Pope* [1974] 1 All ER 512, [1974] 1 WLR 719 (both following *Walmsley v White* above). See also *Plews v Baker* (1873) LR 16 Eq 564; *Law v Garrett* (1878) 8 ChD 26, CA (forum selected by the partners was a foreign commercial court); *Belfield v Bourne* [1894] 1 Ch 521 at 523; *Vawdrey v Simpson* [1896] 1 Ch 166 at 168; *Machin v Bennett* [1900] WN 146. See further *Green v Waring* (1764) 1 Wm Bl 475; *Simmonds v Swaine* (1809) 1 Taunt 549.

5 Ie under the Arbitration Act 1996 s 9: see **ARBITRATION** vol 2 (2008) PARA 1222.

6 See the Arbitration Act 1996 s 9(4); and **ARBITRATION** vol 2 (2008) PARA 1222.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(2) DISSOLUTION BY THE COURT/(ii) Grounds of Dissolution/A. MENTAL INCAPACITY/184. Dissolution when partner suffering from mental incapacity.

(ii) Grounds of Dissolution

A. MENTAL INCAPACITY

184. Dissolution when partner suffering from mental incapacity.

The mental incapacity of a partner does not of itself dissolve the partnership¹. However, if a person lacks capacity² in relation to a matter or matters concerning his personal welfare or his property and affairs, the Court of Protection may, by making an order, make decisions on his behalf in relation to those matters, or may appoint a deputy to make decisions on his behalf³. This may include the taking of a decision which will have the effect of dissolving a partnership of which the person is a member⁴.

1 *Wrexham v Hudleston* (1734) 1 Swan 514n; *Waters v Taylor* (1813) 2 Ves & B 299 at 303; *Anon* (1856) 2 K & J 441 at 447; and see PARA 36; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 607. Until dissolution, the power of a mentally disordered person to bind his firm seems to continue, notwithstanding the rule that the insanity of the principal revokes the authority of an agent: *Yonge v Toynbee* [1910] 1 KB 215, CA. If, however, a claim for dissolution is pending, the mentally disordered person may be restrained from interfering: *J v S* [1894] 3 Ch 72.

2 A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain: see the Mental Capacity Act 2005 ss 2, 3; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 641. It does not matter whether the impairment or disturbance is permanent or temporary: s 2(2).

3 Mental Capacity Act 2005 s 16(1), (2). The powers of the court are subject to the principles that: (1) a person must be assumed to have capacity unless it is established that he lacks capacity; (2) a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success; (3) a person is not to be treated as unable to make a decision merely because he makes an unwise decision; (4) an act done, or decision made, under the Mental Capacity Act 2005 for or on behalf of a person who lacks capacity must be done, or made, in his best interests: see ss 1, 4, 16(3); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 642.

4 Mental Capacity Act 2005 s 18(1)(e).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(2) DISSOLUTION BY THE COURT/(ii) Grounds of Dissolution/A. MENTAL INCAPACITY/185. Special provision for dissolution in partnership agreement.

185. Special provision for dissolution in partnership agreement.

Where a partnership agreement provides for dissolution in certain events, the mental incapacity of one of the partners does not prevent the partnership being dissolved in accordance with the provisions of the partnership agreement¹. Where, however, notice of dissolution has been served on a partner who is mentally incapable, the partner serving the notice may withdraw it².

¹ *Robertson v Lockie* (1846) 15 Sim 285; *Mellersh v Keen* (1859) 27 Beav 236. Dissolution is then effective from the date envisaged in the partnership agreement: see PARA 191.

² *Jones v Lloyd* (1874) LR 18 Eq 265. As to the general rule that notice of dissolution cannot be withdrawn see PARA 174.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4.
DISSOLUTION/(2) DISSOLUTION BY THE COURT/(ii) Grounds of Dissolution/B. GROUNDS
OTHER THAN MENTAL INCAPACITY/186. Permanent incapacity.

B. GROUNDS OTHER THAN MENTAL INCAPACITY

186. Permanent incapacity.

On application by a partner, the court may decree a dissolution of the partnership when any partner, other than the partner suing, becomes permanently incapable in any way, otherwise than by reason of mental disorder¹, of performing his part of the partnership agreement².

¹ The Partnership Act 1890 s 35(b) expressly excludes mental disorder from this case of dissolution; sed quaere whether this is right since s 35(a) (power of the court to order dissolution of a partnership on the grounds of the insanity of one of the partners) was repealed by the Mental Health Act 1959 s 149(2), Sch 8 Pt I. In any event the judge having jurisdiction under the Mental Capacity Act 2005 retains the power to make an order for the dissolution of any partnership of which the partner suffering from mental incapacity is a member: see ss 16, 18; PARA 184; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 759.

² Partnership Act 1890 s 35(b); *Whitwell v Arthur* (1865) 35 Beav 140 (incapacity due to paralysis but, since the partner's health improved before the trial, further proceedings were stayed, although liberty to apply was reserved).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(2) DISSOLUTION BY THE COURT/(ii) Grounds of Dissolution/B. GROUNDS OTHER THAN MENTAL INCAPACITY/187. Conduct prejudicial to the partnership business.

187. Conduct prejudicial to the partnership business.

On application by a partner, the court may decree a dissolution when any partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the court, regard being had to the nature of the business, is calculated to affect prejudicially the carrying on of the business¹. Thus, it has been held that the adultery of a partner is no reason for dissolving a mercantile partnership; but the immoral conduct of one of two medical partners may be a sufficient ground²; and embezzlement of trust funds of clients by a solicitor entitles his partner to an immediate dissolution³.

1 Partnership Act 1890 s 35(c). As to what is infamous conduct in a professional respect see eg *Clifford v Timms* [1908] AC 12, HL (professional misconduct by dentist); *Clifford v Phillips* [1908] AC 15, HL; *Re A Solicitor, ex p Law Society* [1912] 1 KB 302, DC. See also **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 456.

2 See *Anon* (1856) 2 K & J 441 at 445 per Wood V-C; *Snow v Milford* (1868) 18 LT 142 at 143 per Lord Romilly MR.

3 *Essell v Hayward* (1860) 30 Beav 158. Cf *Pearce v Foster* (1886) 17 QBD 536, CA, which shows that conduct by an employee may be prejudicial to the business, even though not directly connected with it; eg gambling on the Stock Exchange by a clerk justifies his dismissal from a business which has nothing to do with stock and share dealings. As to the expulsion of a partner who is guilty of conduct held to be detrimental to the firm, even though the conduct in question, namely travelling on the railway without a ticket and with intent to avoid payment of the fare for which the partner had been convicted, had no connection with the firm's business, see *Carmichael v Evans* [1904] 1 Ch 486. As to expulsion generally see PARA 179.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(2) DISSOLUTION BY THE COURT/(ii) Grounds of Dissolution/B. GROUNDS OTHER THAN MENTAL INCAPACITY/188. Breach of partnership agreement or unreasonable conduct.

188. Breach of partnership agreement or unreasonable conduct.

On application by a partner, the court may decree a dissolution when a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement¹, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him².

Thus, whereas mere partnership squabbles are not sufficient to induce the court to order a dissolution³, if a state of complete and permanent animosity exists, so that the breach between the partners is irreparable and mutual confidence is destroyed, the court will grant relief⁴. Similarly, neglect to account for money received, especially if so frequent as to be almost systematic⁵, or the application of sums received to the payment of private debts⁶, or refusal to account and the taking away of the partnership books⁷, being acts inconsistent with the duty of a partner and destructive of the mutual confidence which ought to subsist between partners⁸, afford good grounds for relief.

The court will not order dissolution on the application of the partner guilty of misconduct⁹. The court has discretion as to whether it will order him to pay the costs of an application for dissolution by his co-partner¹⁰.

1 Partnership Act 1890 s 35(d); *Goodman v Whitcomb* (1820) 1 Jac & W 589 at 592; *Loscombe v Russell* (1830) 4 Sim 8 at 11; *Anderson v Anderson* (1857) 25 Beav 190 (one instance of breach of the partnership contract in eight years held to be insufficient ground for the interference of the court; although, as both parties admitted that it was useless to continue the partnership, a dissolution was ordered). 'It must be a studied, prolonged and continued inattention to the application of one party calling upon the other to observe that contract' (ie the partnership contract): *Marshall v Colman* (1820) 2 Jac & W 266 at 268 per Lord Eldon LC. See also *Mullins v Laughton* [2002] EWHC 2761 (Ch), [2003] Ch 250, [2003] 4 All ER 94.

2 Partnership Act 1890 s 35(d); *Waters v Taylor* (1813) 2 Ves & B 299; *Smith v Jeyes* (1841) 4 Beav 503 at 505; *Harrison v Tennant* (1856) 21 Beav 482; *Watney v Wells* (1861) 30 Beav 56 at 60. There will often be an overlap between this ground for dissolution and the 'just and equitable' grounds under the Partnership Act 1890 s 35(f): see PARA 190. As to the duty of good faith see PARA 106.

3 *Wray v Hutchinson* (1834) 2 My & K 235.

4 *Baxter v West* (1860) 1 Drew & Sm 173; *Harrison v Tennant* (1856) 21 Beav 482; *Leary v Shout* (1864) 33 Beav 582; *Atwood v Maude* (1868) 3 Ch App 369 at 373; cf *Pearce v Lindsay* (1860) 3 De GJ & Sm 139. Where the court is satisfied that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it, it will order a dissolution: *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 at 430, CA, per Cozens-Hardy MR, followed in *Re Davis and Collett Ltd* [1935] Ch 693 at 701, 702.

5 *Cheesman v Price* (1865) 35 Beav 142.

6 *Smith v Jeyes* (1841) 4 Beav 503.

7 *Charlton v Poulter* (1753) cited in 19 Ves at 148n (the Brewers' Case).

8 *Smith v Jeyes* (1841) 4 Beav 503 at 506.

9 See the Partnership Act 1890 s 35(d). No party is entitled to act improperly and then to say that the conduct of the partners and their feelings towards each other are such that the partnership can no longer be continued; and certainly the court would not allow any person so to act and thus to take advantage of his own

wrong: *Harrison v Tennant* (1856) 21 Beav 482 at 493 per Romilly MR; and see *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, CA. The dictum of Lord Cairns to the contrary effect in *Atwood v Maude* (1868) 3 Ch App 369 at 373 is clearly displaced by the Partnership Act 1890 s 35(d).

10 As to the court's discretion in making orders as to costs see CPR 44.3; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1738 et seq. See also *Hawkins v Parsons* (1862) 31 LJ Ch 479.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(2) DISSOLUTION BY THE COURT/(ii) Grounds of Dissolution/B. GROUNDS OTHER THAN MENTAL INCAPACITY/189. Business carried on at a loss.

189. Business carried on at a loss.

On application by a partner, the court may decree a dissolution when the business of the partnership can only be carried on at a loss¹. Every partnership is entered into with a view to profit², and, if the business can only be carried on at a loss, the whole purpose of the partnership fails, and it may be dissolved even though the original term for which it was formed has not expired³.

1 Partnership Act 1890 s 35(e).

2 See PARA 4.

3 *Bailey v Ford* (1843) 13 Sim 495 (court, on motion before the hearing, appointed a person to sell the business and wind up the partnership); *Jennings v Baddeley* (1856) 3 K & J 78. See also *Re Suburban Hotel Co* (1867) 2 Ch App 737 at 744 per Lord Cairns LJ. If the errors can be attributed to special circumstances and cannot clearly be traced to any inherent defect in the business, the court will refuse the relief: *Handyside v Campbell* (1901) 17 TLR 623. See also *Baring v Dix* (1786) 1 Cox Eq Cas 213. If, however, the purposes of the partnership cannot be carried into effect with any reasonable prospect of profit, the court will dissolve the partnership: *Wilson v Church* (1879) 13 ChD 1 at 65, CA, per Cotton LJ (affd sub nom *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176, HL).

As to insolvent partnerships see PARAS 99, 233; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 817 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1166-1301.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(2) DISSOLUTION BY THE COURT/(ii) Grounds of Dissolution/B. GROUNDS OTHER THAN MENTAL INCAPACITY/190. Dissolution just and equitable.

190. Dissolution just and equitable.

On the application of a partner, the court may decree a dissolution whenever, in any case, circumstances have arisen which, in the court's opinion, render it just and equitable that the partnership be dissolved¹. If the winding up or dissolution of a partnership is justified on other grounds, the incapacity of one partner will not prevent a sale of the partnership concern and assets², and the sale of the whole or of one or more of the partnership assets to the other partners will be sanctioned if it appears to be for the benefit of the partner suffering from the incapacity³.

1 Partnership Act 1890 s 35(f). The question as to what is just and equitable within the meaning of the similar provision in the Insolvency Act 1986 s 122(1)(g), enabling the court to wind up a limited company when it is just and equitable to do so, has been considered in *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, CA (where the company was in substance a partnership): see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 448. See also *Jesner v Jarrad Properties Ltd* [1992] BCC 807 (a quasi partnership where, because of a general breakdown in the mutual trust and understanding between the family members, it was found that constant resort to legal advisers would have been likely were the quasi partner relationship to continue). In *Re J E Cade & Son Ltd* [1991] BCC 360, where two brothers had been partners in a family farming partnership which had subsequently been dissolved and the farm (previously an asset of the partnership) had then been licensed to the company of which the brothers were shareholders, it was held that, although in normal circumstances it may have been appropriate to order the winding up of the company concerned where the understanding between the members was no longer respected, an order for winding up was refused since the plaintiff sought the order not in order to protect his interests as member of the company, but as landlord of the farm. Quare whether a partner who sought winding up under the Partnership Act 1890 s 35(f) for similar motives would be similarly precluded. Furthermore, the words 'just and equitable' in the Insolvency Act 1986 s 122(1)(g) are not to be construed as relating only to matters ejusdem generis with the grounds for winding up set out in s 122(1)(a)-(f): *Re Amalgamated Syndicate* [1897] 2 Ch 600. See generally **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 448.

2 It was so decided in the case of a mentally disordered partner in *Rowlands v Evans, Williams v Rowlands* (1861) 30 Beav 302. As to partnerships where one or more partners is or are suffering from mental incapacity see PARA 184 et seq.

3 *Crawshay v Maule* (1818) 1 Swan 495 at 540 (firm where one of the partners was a minor). As to minors as partners see PARA 33.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(2) DISSOLUTION BY THE COURT/(iii) Date of Dissolution/191. Date of dissolution.

(iii) Date of Dissolution

191. Date of dissolution.

Where an application is made to the court for the dissolution of a firm¹, the firm is dissolved as from the date of judgment for such dissolution and not from some earlier date such as the issue or service of the claim form in the proceedings or the commencement of a partner's incapacity².

Alternatively, where a firm is dissolved by a notice of dissolution given by a partner empowered by virtue of the partnership agreement to give such notice, the firm is dissolved as from the date specified in the notice³. If, however, provision has been made in the partnership agreement for automatic dissolution upon the happening of some event, such as a partner becoming mentally disordered, the dissolution takes effect from the date contemplated in the partnership agreement⁴.

¹ See under the Partnership Act 1890 s 35 (see PARAS 186-190) or the Mental Capacity Act 2005 ss 16, 18 (see PARA 184). As to the dissolution of a partnership at will by notice in a normal case see PARA 174.

² *Besch v Frolich* (1842) 1 Ph 172; *Sander v Sander* (1845) 2 Coll 276; *Re Coles, Leaf v Coles* (1852) 1 De GM & G 171; *Jones v Welch* (1855) 1 K & J 765. However, in *Phillips v Melville* [1921] NZLR 571 it was held (apparently on the ground that a partnership at will is determinable on notice: see PARA 174) that the firm was dissolved as from the date of the service of the writ; and in *Kirby v Carr* (1838) 3 Y & C Ex 184 and *Shepherd v Allen* (1864) 33 Beav 577 (overruled in *Unsworth v Jordan* [1896] WN 2) that the firm was dissolved as from the date of filing of the bill. Since in *Phillips v Melville* above, *Kirby v Carr* above and *Shepherd v Allen* above, although the firms concerned were partnerships at will, no notice of dissolution was ever given (either by way of a notice given out of court or by way of the service of a writ claiming a declaration that the firm was dissolved by reason of such service) but rather the court's jurisdiction to dissolve was being sought, the decisions would appear to be anomalous.

³ *Robertson v Lockie* (1846) 15 Sim 285; *Mellersh v Keen* (1859) 27 Beav 236; but see *Hunter v Wylie* 1993 SLT 1091n (where it was held that partners who had acted in material breach of the partnership agreement, namely by withdrawing capital without the other partners' consent, were not then entitled to exercise their contractual right to dissolve the firm).

⁴ *Bagshaw v Parker* (1847) 10 Beav 532. As to dissolution on the grounds of mental incapacity see PARAS 184-185.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4.
DISSOLUTION/(3) RETURN OF PREMIUMS/192. Court's discretion to order return of premiums.

(3) RETURN OF PREMIUMS

192. Court's discretion to order return of premiums.

Where one partner has paid a premium¹ to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term, otherwise than by the death of a partner, the court may order the repayment of the premium or such part of it as it thinks just². In determining the amount of premium to be returned, the court must have regard to the terms of the partnership agreement and to the length of time during which the partnership has continued³. The premium, being treated as paid for the whole term, is apportioned between the time which the partnership lasted and the unexpired residue⁴. The question of a return of premium should be dealt with at the trial of the claim for dissolution; afterwards the permission of the court is necessary, and this is given only if the circumstances are such that the court would give permission to bring a supplemental claim⁵.

If arbitrators have power under the partnership agreement to award a dissolution, they also have power to consider the terms of the dissolution, including the question of the amount, if any, of premium to be returned⁶.

1 The obligation upon an incoming partner to pay a premium as the price of his entry into the partnership is becoming increasingly rare, although it is still occasionally encountered in trading partnerships.

2 Partnership Act 1890 s 40. The principle upon which the court interferes is that the consideration in respect of which the money is paid fails (and is not obtained by the person who pays the money) in consequence of an unforeseen interruption: *Freeland v Stansfeld* (1854) 2 Sm & G 479 at 484 per Stuart V-C. See similar statements of the principle in *Tattersall v Groote* (1800) 2 Bos & P 131 at 134 per Lord Eldon LC; in *Bullock v Crockett* (1862) 3 Giff 507 at 512 per Stuart Y-C; and in *Edmonds v Robinson* (1885) 29 ChD 170 at 175 per Kay J. As to premiums paid under misrepresentations see *Jauncey v Knowles* (1859) 29 LJ Ch 95; and PARAS 147-148.

3 Partnership Act 1890 s 40.

4 'The court has always treated it, I believe, as a mere arithmetical question': *Wilson v Johnstone* (1873) LR 16 Eq 606 at 609 per Wickens V-C. See also *Bury v Allen* (1845) 1 Coll 589; *Pease v Hewitt* (1862) 31 Beav 22; *Brewer v Yorke* (1882) 46 LT 289, CA. It is difficult, however, to apply the principle of extension of the premium over the whole term of the partnership where part of the consideration is not referable to the whole of the agreed period (*Bullock v Crockett* (1862) 3 Giff 507); and before the Partnership Act 1890 it was said that the court would consider all the circumstances (see eg *Lyon v Tweddell* (1881) 17 ChD 529, CA).

5 Eg if the facts were first discovered after the judgment: see *Edmonds v Robinson* (1885) 29 ChD 170.

6 *Belfield v Bourne* [1894] 1 Ch 521, distinguishing *Tattersall v Groote* (1800) 2 Bos & P 131.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(3) RETURN OF PREMIUMS/193. When premiums will not be returned.

193. When premiums will not be returned.

The Partnership Act 1890 gives the court no jurisdiction to order the return of premiums either on the death of a partner¹, or if the dissolution is, in the judgment of the court, wholly or chiefly due to the misconduct of the partner who paid the premium², or when the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium³.

Neither will the court grant the relief if the partner seeking the return of his premium has expressly or impliedly waived this right⁴, nor if he has become bankrupt, unless his bankruptcy is attributable to a breach of partnership duty by the partner to whom he paid the premium⁵. Where, however, the partnership has been dissolved without any fault of either party⁶, or if there are faults on both sides⁷, or if the recipient of the premium has himself caused the dissolution⁸, or had always known of his partner's incompetence⁹, the equity will be enforced by the court.

Generally, in the absence of fraud or contrary agreement, premiums are not repayable in the case of a partnership at will¹⁰.

1 Partnership Act 1890 s 40; *Whincup v Hughes* (1871) LR 6 CP 78; *Ferns v Carr* (1885) 28 ChD 409. If, however, the partner taking the premium knows at the time that he is suffering from a fatal disease and this is not known to the partner paying the premium, on the death of the former during the term an apportionment may be ordered on the ground of the failure of the consideration: see *Mackenna v Parkes* (1866) 36 LJ Ch 366; and **CONTRACT** vol 9(1) (Reissue) PARA 450 et seq (frustration); **RESTITUTION** vol 40(1) (2007 Reissue) PARA 87 et seq (failure of consideration).

2 Partnership Act 1890 s 40(a); *Bullock v Crockett* (1862) 3 Giff 507; *Atwood v Maude* (1868) 3 Ch App 369; *Bluck v Capstick* (1879) 12 ChD 863 (unpaid premium ordered to be paid by the guilty partner); *Yates v Cousins* (1889) 60 LT 535. Conduct, although objectionable and such as would entitle his partner to a dissolution, is not sufficient to deprive the partner paying the premium of his right to return of premium (*Wilson v Johnstone* (1873) LR 16 Eq 606); nor is it material that the partner paying the premium is the party who seeks the dissolution (*Atwood v Maude* above).

3 Partnership Act 1890 s 40(b); *Lee v Page* (1861) 30 LJ Ch 857; *Belfield v Bourne* [1894] 1 Ch 521 at 527; cf *Handyside v Campbell* (1901) 17 TLR 623.

4 See *Bond v Milbourn* (1871) 20 WR 197, explained in *Rooke v Nisbet* (1881) 50 LJ Ch 588. Cf *Andrewes v Jones* (1865) 12 LT 229; *Brewer v Yorke* (1882) 46 LT 289, CA.

5 *Akhurst v Jackson* (1818) 1 Wils Ch 47. The court ordered a return of part of the premium where the partner who paid the premium was made bankrupt by the recipient (*Hamil v Stokes* (1817) 4 Price 161, Ex Ch); and where the recipient became bankrupt, having been in embarrassed circumstances at the commencement of the partnership, and the partner who paid the premium had no notice of the fact (*Freeland v Stanfeld* (1854) 2 Sm & G 479); but a return was not ordered where he had notice (*Akhurst v Jackson* above).

6 *Atwood v Maude* (1868) 3 Ch App 369; cf *Airey v Borham* (1861) 29 Beav 620.

7 *Astle v Wright* (1856) 23 Beav 77; *Pease v Hewitt* (1862) 31 Beav 22.

8 *Atwood v Maude* (1868) 3 Ch App 369; *Airey v Borham* (1861) 29 Beav 620; *Hamil v Stokes* (1817) 4 Price 161, Ex Ch; *Bury v Allen* (1845) 1 Coll 589 (misconduct principally that of the partner receiving the premium); *Bullock v Crockett* (1862) 3 Giff 507.

9 Incompetence is not misconduct and does not, in itself, form a bar to this equity if the incompetence was known to the partner receiving the premium at, or almost at, the commencement of the partnership and was the ground of his demanding an increased premium: *Atwood v Maude* (1868) 3 Ch App 369 at 375; *Brewer v Yorke* (1882) 46 LT 289 at 293, CA, where Brett LJ said that mere incompetence, however great, without proof of damage caused by it, ought not to be a ground for declining, upon a dissolution of partnership, to return the

proportionate amount of premium; but Holker LJ dissented from this statement of the law (*Brewer v Yorke* at 295).

10 See *Tattersall v Groote* (1800) 2 Bos & P 131 at 134. In the case of a partnership for no definite time, however, the recipient may not dissolve the partnership immediately and retain the premium: see *Featherstonhaugh v Turner* (1858) 25 Beav 382 at 391.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(4) NOTICE OF DISSOLUTION/194. Advertisement of dissolution.

(4) NOTICE OF DISSOLUTION

194. Advertisement of dissolution.

On the dissolution of a partnership or retirement of a partner, any partner may give public notice of the fact, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence¹.

¹ Partnership Act 1890 s 37; *Troughton v Hunter* (1854) 18 Beav 470; *Hendry v Turner* (1886) 32 ChD 355. A partner may advertise that he is no longer connected with a periodical that the firm publishes, but he must not advertise that the periodical is being discontinued, if it is a firm asset which might be sold: *Bradbury v Dickens* (1859) 27 Beav 53; and see PARA 213. As to dissolution by notice see PARA 174; and as to the death of a partner see PARA 176.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(4) NOTICE OF DISSOLUTION/195. Old customers.

195. Old customers.

Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members¹ of the old firm as still being members of the firm until he has notice of the change². As regards those who previously had dealings with the firm, notice of the dissolution published in the appropriate Gazette³ is not in itself sufficient⁴, but evidence of facts showing that it is probable that an old customer had seen the Gazette is admissible⁵.

Notice to old customers is usually given by circular letter⁶, but any mode by which actual knowledge is given suffices⁷. The execution by a customer of a power of attorney to the new firm has been held to establish evidence of knowledge of the retirement of a partner⁸, and proof of the preparation and transmission by a solicitor of the draft of a deed of dissolution may throw upon the solicitor the burden of showing the abandonment by the partners of intention to dissolve⁹.

1 'Apparent members' means members apparent to the person dealing with the firm: *Tower Cabinet Co Ltd v Ingram* [1949] 2 KB 397, [1949] 1 All ER 1033, DC.

2 Partnership Act 1890 s 36(1).

3 As to advertisements in the appropriate Gazette see PARA 196.

4 Partnership Act 1890 s 36(2); *Graham v Hope* (1792) Peake 154; *Gorham v Thompson* (1791) Peake 42; *Re Hodgson*, *Beckett v Ramsdale* (1885) 31 ChD 177 at 184, CA.

5 *Godfrey v Macauley* (1795) Peake 209n.

6 The categories of client who should be notified by circular may vary according to whether there has been a general dissolution of the firm or merely a technical dissolution brought about eg by the expulsion of one of its partners: see *Fulwell v Bragg* (1983) 127 Sol Jo 171.

7 *Barfoot v Goodall* (1811) 3 Camp 147 at 149 (change by a banking partnership in its forms of cheque held to be sufficient notice to an old customer who had drawn cheques in the new form). See also *J L Smallman Ltd v O'Moore* [1959] IR 220. One insertion of an advertisement of dissolution in a newspaper proved to be taken by the customer and to have been left at his house has been admitted as evidence of notice, although not proved to have reached his hands (*Jenkins v Blizzard* (1816) 1 Stark 418), but evidence of such an insertion was excluded where it was not proved that he was in the habit of taking the newspaper, although it circulated in the town where he resided (*Norwich and Lowestoft Navigation Co v Theobald* (1828) Mood & M 151).

8 *Hart v Alexander* (1837) 2 M & W 484.

9 *Paterson v Zachariah and Arnold* (1815) 1 Stark 71.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(4) NOTICE OF DISSOLUTION/196. Advertisement is sufficient notice to new customers.

196. Advertisement is sufficient notice to new customers.

An advertisement in the London Gazette as to a firm whose principal place of business¹ is in England and Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Belfast Gazette as to a firm whose principal place of business is in Northern Ireland² is notice as to persons who had not had dealings with the firm before the date of the dissolution or change so advertised³. It is immaterial whether they have seen the advertisement in the Gazette or not; but an advertisement in any other newspaper may not be given in evidence without preliminary proof that the customer was in the habit of taking that newspaper⁴. A public advertisement in newspapers, taken at a reading room where a creditor was in the habit of reading the newspapers, has been received as evidence of knowledge, in a case in which there was no notice in the Gazette⁵.

1 As to the principal place of business see PARA 88 note 3.

2 Government of Ireland (Miscellaneous Adaptations) (Northern Ireland) Order 1923, SR & O 1923/803, art 3.

3 Partnership Act 1890 s 36(2); *Godfrey v Turnbull and Macauley* (1795) 1 Esp 371, sub nom *Godfrey v Macauley* Peake 209n; *Wrightson v Pullan* (1816) 1 Stark 375. As to the liability of a retired partner see PARAS 77-78.

4 *Leeson v Holt* (1816) 1 Stark 186.

5 *Rooth v Quin and Janney* (1819) 7 Price 193. As to the weight of such evidence see, however, *Hart v Alexander* (1837) 2 M & W 484 at 491, 494. See also *M'Iver v Humble* (1812) 16 East 169.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(5) ENFORCEMENT OF PARTNERS' RIGHTS ON DISSOLUTION/197. Determination of partners' rights on dissolution.

(5) ENFORCEMENT OF PARTNERS' RIGHTS ON DISSOLUTION

197. Determination of partners' rights on dissolution.

On dissolution it may be necessary for the court to determine partners' rights¹ between themselves, especially where questions as to the construction of the partnership agreement are raised². As a general rule, the court will not order an account of partnership dealings unless the claimant also claims dissolution³.

1 As to the enforcement of partners' rights see PARA 144 et seq.

2 See PARA 144.

3 See PARA 151. As to orders for account see PARAS 150-161.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(i) Continuation of Partner's Authority/198. Partnership continues after dissolution only for winding up.

(6) WINDING UP THE PARTNERSHIP BUSINESS

(i) Continuation of Partner's Authority

198. Partnership continues after dissolution only for winding up.

After dissolution, the partnership subsists merely for the purpose of completing pending transactions, winding up the business, and adjusting the rights of the partners¹. For these purposes, and these only, the authority, rights and obligations of the partners continue², including the partners' duty of good faith³.

Dissolution of the partnership necessitates the termination of its employees' contracts of employment, which may amount to wrongful dismissal⁴. Upon dissolution partnership land, like a firm's other assets, will fall to be sold or assigned in the ordinary way⁵. Where the partnership land in question is leasehold, such a sale or assignment without the landlord's consent may result in the breach by the tenant partners of a covenant contained in the lease against parting with possession⁶.

1 *Beak v Beak* (1675) 3 Swan 627; *Crawshay v Maule* (1818) 1 Swan 495 at 507. Where the business of a partnership, the term of which had expired, was continued by both partners merely for the purpose of realisation and winding up, it was held that their conduct showed an intention not to continue the former business, and that a clause in the partnership agreement providing for purchase by the survivor of the share of the other on his death had ceased to be applicable: *Myers v Myers* (1891) 60 LJ Ch 311. As to the tax consequences of dissolution see *C Connelly & Co v Wilbey (Inspector of Taxes)* [1992] STC 783; and **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 232 et seq.

2 See the Partnership Act 1890 s 38; and PARA 52. See also *Crawshay v Collins* (1808) 15 Ves 218 at 226 per Lord Eldon LC; *Cruikshank v M'Vicar* (1844) 8 Beav 106 at 116 per Lord Langdale MR; cf *Wood v Braddick* (1808) 1 Taunt 104 at 105; *Booth v Parks* (1828) 1 Mol 465; *Lewis v Reilly* (1841) 4 Per & Dav 629. As to the difference between a continuing partnership and one in course of winding up as affecting the liability of a retired partner for acts of the continuing partner see *Smith v Winter* (1838) 4 M & W 454; and PARAS 45-46, 77-78. As to the right or otherwise of a partner to claim remuneration for managing the business of a firm during its winding up see PARA 111.

3 See *Hogar Estates Ltd in Trust v Shebron Holdings Ltd* (1979) 25 OR (2d) 543, 101 DLR (3d) 509 (Ont). As to the partners' duty of good faith see PARA 106.

4 *Tunstall v Condon* [1980] ICR 786, EAT; and see PARA 18 note 8.

5 As to which assets constitute partnership assets see PARA 116 et seq. As to the partners' right to have the firm's assets sold see PARA 206.

6 See PARA 11. For covenants as to alienation generally see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 481 et seq.

UPDATE

198 Partnership continues after dissolution only for winding up

NOTE 2--However s 38 does not extend to technical dissolution: *HLB Kidsons (formerly Kidsons Impey) v Lloyd's Underwriters Subscribing Policy No 621/PK1D00101* [2008]

EWHC 2415 (Comm), [2009] 1 All ER (Comm) 760 (merger of two firms did not dissolve partnership within meaning of s 38).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(i) Continuation of Partner's Authority/199. Third party debts and liabilities.

199. Third party debts and liabilities.

After dissolution, each partner has authority to give a valid security on partnership property for money required for the completion of a pending contract¹; and any partner may withdraw money on deposit with a bank², or receive a debt and give a release or take a bill for it, even though the terms of dissolution provide that, as between the partners, the debts should be received by only one of them³.

A recognition of a debt in a letter from one ex-partner of a dissolved firm to another is not an acknowledgment of the debt⁴ so as to take it out of the Limitation Act 1980⁵, and part payment of a debt by a continuing partner after dissolution does not prevent time from running under that Act in favour of a retiring partner⁶.

No third person, even with notice, is concerned with the partners' own arrangements to discharge their debts⁷. Where two partners enter into a joint speculation with a third person, and afterwards dissolve their partnership, the dissolution of the partnership does not prevent the third person who continues to rely upon their joint responsibility from holding them jointly liable⁸.

1 *Butchart v Dresser* (1853) 10 Hare 453; affd 4 De GM & G 542. As to the power of a surviving partner after dissolution to give security for a past partnership debt see PARA 52.

2 *Dickson v National Bank of Scotland Ltd* 1917 SC (HL) 50.

3 *King v Smith* (1829) 4 C & P 108. As between the partners, however, the benefit of such a withdrawal or receipt would have to be accounted for: see PARA 107. Under the old bankruptcy law the continuing partners were entitled to issue a bankruptcy notice in the name of the partnership in respect of a judgment obtained by the firm before dissolution: see *Re Hill, ex p Holt & Co* [1921] 2 KB 831. Whether the same principle applies under the Insolvency Act 1986 is unclear. As to insolvent partnerships generally see PARAS 99, 233; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 817 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1166-1301.

4 See the Limitation Act 1980 s 29(5); and **LIMITATION PERIODS** vol 68 (2008) PARAS 1184, 1209.

5 *Re Hindmarsh* (1860) 1 Drew & Sm 129.

6 *Watson v Woodman* (1875) LR 20 Eq 721. The rule is different where the retirement is secret: see *Re Tucker, Tucker v Tucker* [1894] 3 Ch 429, CA; PARA 5; and **LIMITATION PERIODS** vol 68 (2008) PARA 1209.

7 See PARAS 77, 200.

8 *Ault v Goodrich* (1828) 4 Russ 430. As to the giving of notice of dissolution to clients and others see PARA 194 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(i) Continuation of Partner's Authority/200. Arrangements between partners for discharge of debts.

200. Arrangements between partners for discharge of debts.

An arrangement between the members of a dissolved partnership that the debts of the firm are to be paid and the affairs wound up by a particular partner does not bind creditors of the firm even if they have notice of such arrangement¹; but a charge by a partner on his private property to secure his firm's banking account² is not available as a security for debts to the bank which are incurred after his death by the surviving partners who continue the business³.

Provisions in partnership or retirement agreements often provide that the partner or partners continuing the firm's activities are to indemnify the outgoing partner against existing partnership liabilities⁴. Even where such an express indemnity is not given, one will normally be implied⁵.

1 *Smith v Jameson* (1794) 5 Term Rep 601; and see PARA 77.

2 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 815 et seq.

3 *Royal Bank of Scotland v Christie* (1841) 8 Cl & Fin 214, HL.

4 In relation to the types of liability which will be covered by an indemnity, income tax is a partnership debt or liability in respect of which a retiring partner may be indemnified: *Stevens v Britten* [1954] 3 All ER 385, [1954] 1 WLR 1340, CA. As to liability to income taxation see further PARA 100; and **INCOME TAXATION**.

5 *Gray v Smith* (1889) 43 ChD 208, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(ii) Distribution of Profits Made After Dissolution/201. Profits after purchase of share of outgoing partner.

(ii) Distribution of Profits Made After Dissolution

201. Profits after purchase of share of outgoing partner.

Where, by the partnership agreement, an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner¹, and that option is duly exercised and its terms complied with in all material respects, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits².

The valuation of the share of a deceased partner should take place as at the date of realisation, and not at the date of death³; but, where a surviving partner exercises an option to buy the share of a deceased partner at a valuation, and the valuation is not completed until some months after the death, the dissolution takes effect as at the date of the death, and the executors of the deceased partner are entitled to a share of profits up to the date of the valuation and to interest on the amount of the valuation after that date⁴. Compensation for his work will, however, as a rule, be allowed to the surviving partner before ascertaining the amount of profit divisible⁵.

1 If the interest of the deceased or outgoing partner includes an interest in land (which, prima facie, as long as the firm owns any land or proprietary interest over land, it will do), such purchase should be effected by means of a contract complying with the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2: see PARAS 39, 119; and **SALE OF LAND** vol 42 (Reissue) PARA 29 et seq. As to the nature of a partner's share in the firm generally see PARA 122.

2 Partnership Act 1890 s 42(2). Cf *Vyse v Foster* (1874) LR 7 HL 318, with *Willett v Blanford* (1842) 1 Hare 253. As to profits made after dissolution see PARA 131.

3 *Meagher v Meagher* [1961] IR 96 (although the court, whilst holding that the deceased partner's share should be valued as at the date of realisation and not the earlier date of the firm's technical dissolution caused by his death, held that what the deceased partner's estate was actually entitled to was the value of the deceased partner's share as at the date of death plus interest at 5%). This unsatisfactory decision was distinguished in *Barclays Bank Trust Co Ltd v Bluff* [1982] Ch 172, [1981] 3 All ER 232 (where it was held that the outgoing partner was entitled to the full value of his share in the firm's assets as at the date of realisation), approved in *Chandroutie v Gajadhar* [1987] AC 147, [1987] 2 WLR 1, PC; and see PARA 203. Cf the position of a retiring partner: see *Sobell v Boston* [1975] 2 All ER 282, [1975] 1 WLR 1587. As to the valuation of partnership capital assets during the continuation of the partnership see *Noble v Noble* 1965 SLT 415, Ct of Sess; and see PARAS 116 note 1, 136 note 8, 156, 216. Where the share of a deceased partner was to be ascertained by reference to a general account made up after his death, it was held, in the absence of usage to the contrary, that the assets were to be taken at their fair value, and not at the value appearing in the partnership books: *Cruikshank v Sutherland* (1922) 92 LJ Ch 136, HL. However, there is no presumption that, on a partner's death, the value of assets is to be determined by their current market value rather than their historical costs as shown in the partnership books: *Re White, White v Minnis* [2001] Ch 393, [2000] 3 All ER 618, CA (considering *Cruikshank v Sutherland*). An option to purchase the share of a deceased partner on giving to his personal representatives notice within a limited time was held to be validly exercised by a notice given to his executors within the time but before probate had been obtained: *Kelsey v Kelsey* (1922) 91 LJ Ch 382.

4 As to the rate of interest and the time from which it is payable see *Wadsworth v Lydall* [1981] 2 All ER 401, CA (10% ordered under the Law Reform (Miscellaneous Provisions) Act 1934 s 3). As to the court's general power to award interest on debts and damages see the Supreme Court Act 1981 s 35A. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt I para 1. At the date at which this volume states the law no such day had been appointed.

5 *Yates v Finn* (1880) 13 ChD 839 at 841; *Brown v De Tastet* (1819) Jac 284 at 298, 299. Such compensation was refused where the surviving partner was the executor of the deceased, and carried on the trade for himself and the children of the deceased: *Burden v Burden* (1813) 1 Ves & B 170; *Stocken v Dawson* (1843) 6 Beav 371 at 376; *Stocken v Dawson* (1848) 17 LJ Ch 282 at 285. Cf *Cook v Collingridge* (1823) Jac 607 at 621, 623; and see PARA 111. As to the general rule that no partner is allowed more than his equal share see PARA 129.

UPDATE

201 Profits after purchase of share of outgoing partner

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(ii) Distribution of Profits Made After Dissolution/202. Profits where share of outgoing partner not purchased.

202. Profits where share of outgoing partner not purchased.

If there is no agreement that the interest of an outgoing partner may be purchased, or if the terms of such an option are not complied with¹, and the remaining partners carry on the business of the firm² with its capital or assets without any final settlement of accounts as between the outgoing partner or his estate, the outgoing partner or his estate has the option of taking either interest at 5 per cent per annum on the value of his share of the assets³, or such share of the profits made after dissolution as the court may find to be attributable to the use of such share⁴. Where executors of a deceased partner accept interest on the value of the testator's share from dissolution to the date of payment, they may not subsequently elect to take a share of profits instead⁵.

1 See the Partnership Act 1890 s 42(2); and PARAS 131, 201.

2 A partner may be carrying on the business even though his 'right to trade hang at all times by the most tenuous thread': *Pathirana v Pathirana* [1967] 1 AC 233 at 239, [1966] 3 WLR 666 at 670-671, PC, per Lord Upjohn.

3 The interest is calculated on the value of the share at the date it is realised, not the date of death: *Meagher v Meagher* [1961] IR 96. The reference in the Partnership Act 1890 s 42(1) to 'the partnership assets' is to the net partnership assets (ie the surplus or what remained out of the gross assets for distribution between the partners after all debts and liabilities of the partnership have been met); and the 'share' is the actual share of those assets assessed by reference to what the partner in question was entitled to receive as apportioned at the conclusion of the winding up process: *Sandhu v Gill* [2005] EWCA Civ 1297, [2006] Ch 456, [2006] 2 All ER 22. As to the determination of the proportion of profits attributable to the assets of the outgoing partner see PARA 203.

4 Partnership Act 1890 s 42(1). As to the meaning of 'profits' in s 42(1) see PARA 203 note 1. The entitlement arises even if the share of the outgoing partner is of little or no monetary value: *Pathirana v Pathirana* [1967] 1 AC 233, [1966] 3 WLR 666, PC. As to the profits made after dissolution see PARA 131. See also *Ahmed Musaji Saleji v Hashim Ebrahim Saleji* (1915) LR 42 Ind App 91, PC. For the principle on which the court acted before the Partnership Act 1890 see *Wedderburn v Wedderburn (No 4)* (1856) 22 Beav 84 at 99 per Romilly MR. See also *Vyse v Foster* (1874) LR 7 HL 318. It was well established that the use of the assets after dissolution, by partners who continued the business, entitled the outgoing partner to share in the profits produced by their use until a final settlement of accounts: *Featherstonhaugh v Fenwick* (1810) 17 Ves 298 at 309; *Turner v Major* (1862) 3 Giff 442. These provisions apply to a partnership with an alien enemy dissolved as a result of the outbreak of war, the alien enemy being entitled after the war to the profits and interest attributable to the use of his share during the war: *Hugh Stevenson & Sons Ltd v AG für Cartonnagen-Industrie* [1917] 1 KB 842, CA; affd [1918] AC 239, HL. Likewise, where a partnership had been dissolved in wartime by the trading with the enemy legislation, an active partner in England who exchanged partnership assets for other assets in his name was accountable as a constructive trustee and, as such, chargeable with interest on money representing the assets, such interest being at the rate of 5% per annum: *Gordon v Gonda* [1955] 2 All ER 762, [1955] 1 WLR 885.

5 *Smith v Everett* (1859) 27 Beav 446.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(ii) Distribution of Profits Made After Dissolution/203. Determination of proportion of profits attributable to assets of outgoing partner.

203. Determination of proportion of profits attributable to assets of outgoing partner.

The court determines what proportion of the profits made after dissolution are, in the special circumstances, properly attributable to the assets of a retiring, bankrupt or deceased partner¹. Thus, a retiring partner may be entitled to an inquiry into what assets have been so used and what use has been made of them, and an account of the profits made in the business since the dissolution². In ascertaining the amount of the share of an outgoing partner, the value of the goodwill of the business, if any, must be taken into account, but it depends upon circumstances whether or not it has any appreciable value³. The share of profits payable after dissolution in respect of the assets of a retiring, bankrupt or deceased partner is not necessarily the share to which he was entitled before dissolution⁴.

1 See the Partnership Act 1890 s 42(1) (see PARAS 131, 202); and *Simpson v Chapman* (1853) 4 De GM & G 154 at 171, 172 per Turner LJ, following and approving *Willett v Blanford* (1842) 1 Hare 253. By 'profits' in the Partnership Act 1890 s 42(1) is meant income, not capital profits, so that a deceased or other outgoing partner retains his interest in the latter whichever option under s 42(1) he chooses: *Barclays Bank Trust Co Ltd v Bluff* [1982] Ch 172, [1981] 3 All ER 232; approved in *Chandroutie v Gajadhar* [1987] AC 147, [1987] 2 WLR 1, PC (partnership dissolved by the death of one of the two partners, the surviving partner carrying on the business, with the assistance of an unrelated third party, without winding up the business; the deceased partner's estate held entitled to his half-share of the proceeds of sale of the partnership assets and to his half-share of the profits made in the three years between death and final winding-up); and applied in *Popat v Shonchhatra* [1997] 3 All ER 800, [1997] 1 WLR 1367, CA (the Partnership Act 1890 s 42(1) does not apply to profit made on the sale of a business when partners have made unequal contributions to partnership profits); and *Emerson (executrix of the estate of James Emerson (deceased)) v Estate of Thomas Matthew Emerson (deceased)* [2004] EWCA Civ 170, [2004] 1 BCLC 575 (the Partnership Act 1890 s 42(1) does not apply to compensation payable to farmers for livestock forced to be culled in response to an outbreak of foot and mouth disease). See also *Sandhu v Gill* [2005] EWCA Civ 1297, [2006] Ch 456, [2006] 2 All ER 22; and PARA 202. See further note 4.

2 *Featherstonhaugh v Fenwick* (1810) 17 Ves 298 at 309; *Mellersh v Keen* (1859) 27 Beav 236. For the form of inquiry see *Manley v Sartori* [1927] 1 Ch 157 at 166, 167. If the defendant partner refuses to produce the books of account, the court may make an assessment: *Pathirana v Pathirana* [1967] 1 AC 233, [1966] 3 WLR 666, PC.

3 *Smith v Everett* (1859) 27 Beav 446 at 455, 456. It is not necessary for the claimant to show that the goodwill has a monetary value: *Pathirana v Pathirana* [1967] 1 AC 233 at 239, [1966] 3 WLR 666 at 670-671, PC. As to disposal of goodwill see PARA 213.

4 The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of parties after his death may materially affect the rights of the parties: *Willett v Blanford* (1842) 1 Hare 253 at 272 per Wigram V-C. The inquiry should be whether the profits were made by any and what application of the fund constituting the capital at the date of dissolution, or by the application of any other and what funds: *Crawshay v Collins* (1808) 15 Ves 218; and see Lord Eldon's subsequent observations as to his decree in *Crawshay v Collins* above, in *Crawshay v Collins* (1826) 2 Russ 325 at 330, in *Brown v De Tastet* (1819) Jac 284 at 297, and in *Cook v Collingridge* (1823) Jac 607 at 622, 623. Where trade was carried on by a surviving partner, with the larger capital of a deceased partner, wrongfully claiming to do so on his own account, the court apportioned the profits to capital, after making all proper allowances including compensation for management to the surviving partner: *Yates v Finn* (1880) 13 ChD 839.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(ii) Distribution of Profits Made After Dissolution/204. Trust money used by partnership.

204. Trust money used by partnership.

When partners who are also trustees of a deceased partner lend trust money to the firm, they are personally liable as trustees to make up any money lost and account for profit or interest on it, even though it may be secured by mortgage of firm property¹. An inquiry may be directed as to whether the beneficiaries will receive more by way of interest or profits². If the partners of such trustees have notice of the breach of trust, they are under the same liability³. Thus, where the executor of a deceased partner improperly uses his testator's assets in the business carried on by him as surviving partner, he is the person liable to account; but persons subsequently taken into partnership by him are not liable unless they have notice of the breach of trust⁴.

The appropriate rate of interest was formerly 5 per cent⁵, but now it is probably the court's short-term investment rate⁶. In certain circumstances, compound interest will be ordered to be paid by the trustee, as, for example, when he was under a duty to call in and accumulate the money, but his partners may only be liable to make good the principal sum with simple interest⁷.

1 *Townend v Townend* (1859) 1 Giff 201; and see *Flockton v Bunning* (1868) 8 Ch App 323n.

2 *Flockton v Bunning* (1868) 8 Ch App 323n.

3 *Flockton v Bunning* (1868) 8 Ch App 323n. As to liability for breach of trust see PARA 73.

4 *MacDonald v Richardson, Richardson v Marten* (1858) 1 Giff 81 at 89.

5 *Flockton v Bunning* (1868) 8 Ch App 323n; and see the cases cited in note 6.

6 *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515 at 547, [1980] 2 All ER 92 at 98 per Brightman LJ.

7 *Jones v Foxall* (1852) 15 Beav 388 at 395, 396; *Williams v Powell* (1852) 15 Beav 461 at 470. For the principles on which the court acts in cases of this kind see also *Docker v Somes* (1834) 2 My & K 655 at 665 per Lord Brougham; *Stroud v Gwyer* (1860) 28 Beav 130; *Burdick v Carrick* (1870) 5 Ch App 233; *Vyse v Foster* (1874) LR 7 HL 318 at 344 per Lord Selborne; *Re Emmet's Estate, Emmet v Emmet* (1881) 17 ChD 142; *Re Barclay, Barclay v Andrew* [1899] 1 Ch 674; *Re Davis, Davis v Davis* [1902] 2 Ch 314; *Re Davy, Hollingworth v Davy* [1908] 1 Ch 61, CA; *Gordon v Gonda* [1955] 2 All ER 762, [1955] 1 WLR 885, CA; *Wallersteiner v Moir (No 2)* [1975] QB 373, 508n, [1975] 1 All ER 849, CA.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(ii) Distribution of Profits Made After Dissolution/205. Rights where new partnership arises by implication.

205. Rights where new partnership arises by implication.

The circumstances in which the assets are employed after the expiration of the partnership term by one partner may be such as to imply a new partnership at will, but governed otherwise, namely save as to its duration, by the provisions applicable to the previous partnership¹. Alternatively, a new partnership at will governed only by the provisions of the Partnership Act 1890 may be created².

1 *Parsons v Hayward* (1862) 4 De GF & J 474; *Hudgell Yeates & Co v Watson* [1978] QB 451, [1978] 2 All ER 363, CA. As to partnerships at will see PARA 43. See also PARA 44.

2 *Firth v Amslake* (1964) 108 Sol Jo 198; cf *Austen v Boys* (1857) 24 Beav 598 (affd (1858) 2 De G & J 626); *Zamikoff v Lundy* [1970] 2 OR 8, 9 DLR (3d) 637 (affd sub nom *Whisper Holdings Ltd v Zamikoff* [1971] SCR 933, 19 DLR (3d) 114); and see PARA 44.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/A. IN GENERAL/206. Right of application and sale of assets.

(iii) Realisation and Disposal of Assets

A. IN GENERAL

206. Right of application and sale of assets.

Upon a general dissolution¹, each partner is entitled, as against the other partners in the firm and all persons claiming through them in respect of their interests as partners, to have the partnership property applied in payment of the firm's debts and liabilities, and after such payment to have the surplus assets applied in payment of what may be due to the partners² after deducting what may be due from them to the firm³. For this purpose, any partner or his representatives may bring a claim to have the business and affairs of the partnership wound up by the court with all proper accounts and inquiries⁴. Subject to any contrary agreement, this implies a right to have the assets sold⁵ to provide a fund for discharge of liabilities, and for the adjustment of the rights of the partners among themselves.

1 As to the distinction between a general and technical dissolution and the different consequences that arise in each case see PARAS 29 note 12, 44, 112, 131 note 4, 179, 181.

2 As to the order of application of assets see PARA 212. As to the extent of the liabilities of an innocent partner who accepts the repudiation of the partnership agreement by the other partners see *Hurst v Bryk* [2002] 1 AC 185, [2000] 2 All ER 193, HL.

3 Partnership Act 1890 s 39.

4 See the Partnership Act 1890 s 39. This provision gives express statutory recognition and effect to the equitable lien which a partner has on the property of the firm and on the shares of his co-partners: see further PARA 142 et seq. Where, after a dissolution, a credit item has not been taken into account, it ought to be divided between the ex-partners in proportion to their shares in the former partnership. If no accounts have been taken, the proper remedy is to have the accounts taken. If this right is barred by limitation, then it is too late to claim a share in such credit item: *Gopala Chetty v Vijayaraghavachariar* [1922] 1 AC 488, PC. A partner's right under the Partnership Act 1890 s 39 applies only in relation to partnership assets: see PARA 116 et seq. Where certain assets constitute the separate estate of one or more of the partners, no such lien can be claimed by the non-owning partner or partners. Equally, where the assets do constitute partnership property but by the terms of the partnership agreement one or more of the partners has or have no interest therein, the court may refuse an application by those non-owning partners for the sale of the assets under s 39: see *Stekel v Ellice* [1973] 1 All ER 465, [1973] 1 WLR 191; and see *Miles v Clarke* [1953] 1 All ER 779, [1959] 1 WLR 537 (where the ownership of assets was considered, there being no express partnership agreement except as to the division of profits). Note that a transfer of the business assets to a limited company would, in the absence of other evidence, bring about the dissolution of the partnership: *Chahal v Mahal* [2005] EWCA Civ 898, [2005] 2 BCLC 655 (on the facts, the partnership had not dissolved).

5 *Featherstonhaugh v Fenwick* (1810) 17 Ves 298; *Wild v Milne* (1859) 26 Beav 504; *Burdon v Barkus* (1861) 3 Giff 412 (on appeal (1862) 4 De GF & J 42); *Steward v Blakeway* (1869) 4 Ch App 603 at 609; cf *Rigden v Pierce* (1822) 6 Madd 353; *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427 at 430, 431, CA. It is only in very exceptional cases that a sale will not be ordered: see *Syers v Syers* (1876) 1 App Cas 174, HL (partners who together owned seven-eighths of the main partnership asset (a music hall) permitted simply to buy out the interest of their co-partner at an agreed price); and see *Latchan v Martin* (1984) 134 NLJ 745, PC. Where the partnership is not dissolved as such, but fails in limine, a sale of what would have been the partnership assets will not generally be ordered, especially where one of the parties had originally been the sole owner of the assets (*Rowan v Dann* (1991) 64 P & CR 202, CA (joint venture)); the assets in question will be held upon a constructive trust for the 'owning' party instead.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/A. IN GENERAL/207. Provisions in partnership agreement to obviate sale.

207. Provisions in partnership agreement to obviate sale.

Partnership agreements often contain provisions intended to obviate a sale, especially in the event of a partial dissolution, and such provisions bind the partners¹. If, however, such provisions cannot be carried out, a sale may be necessary, although the partnership agreement may provide for the distribution of the assets among the partners in kind, and in this event any partner or his personal representatives may apply to the court to wind up the affairs of the firm².

1 Whether such provisions will apply in the event of a general dissolution is a matter of construction: *Rigden v Pierce* (1822) 6 Madd 353. It appears, however, that the court will be more willing to construe such provisions in favour of a distribution rather than a sale where the asset concerned is not real property: see *Bradbury v Dickens* (1859) 27 Beav 53 (goodwill). As to partnership agreements see PARA 41.

2 See the Partnership Act 1890 s 39; and *Taylor v Neate* (1888) 39 ChD 538; cf *Cook v Collingridge* (1823) Jac 607. As to the principles upon which the court acts in ordering a sale see PARA 208. The same principles should, so far as practicable, guide the partners in disposing of the assets out of court. As to the valuation of and mode of dealing with unsaleable assets see PARA 210.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/B. SALE BY ORDER OF THE COURT/208. When a sale may be ordered.

B. SALE BY ORDER OF THE COURT

208. When a sale may be ordered.

In general, the court will order a sale¹ of partnership assets² on dissolution, unless there is agreement to the contrary³. It may even order a sale before dissolution⁴. A sale may be ordered where an option for a surviving or continuing partner to purchase at a valuation is not exercised⁵. Where there is an agreement that at the expiry of a fixed-term partnership⁶ one partner's share in the firm is to be purchased by the other partner at a valuation, but such valuation cannot be carried out in the precise manner stipulated, in consequence of the omission to provide for an umpire, the court may decline to order a sale and may itself carry out the valuation⁷.

The court will order partnership land⁸ to be sold, even though there are no outstanding partnership debts⁹.

1 See PARA 206 note 5.

2 As to what constitutes partnership assets see PARA 116 et seq.

3 See the Partnership Act 1890 s 39; and the cases cited in PARA 206 notes 4, 5.

4 *Heath v Fisher* (1868) 38 LJ Ch 14 (where the firm's financial situation was deteriorating rapidly); and see PARA 209.

5 *Downs v Collins* (1848) 6 Hare 418. Under the old bankruptcy law a sale could also be ordered where an option for a surviving partner to purchase at a valuation was a fraud upon the bankruptcy law: see *Wilson v Greenwood* (1818) 1 Swan 471; *Whitmore v Mason* (1861) 2 John & H 204; *Collins v Barker* [1893] 1 Ch 578. Quaere whether the same principle would be applied under the Insolvency Act 1986.

6 As to fixed term partnerships see PARA 43.

7 *Dinham v Bradford* (1869) 5 Ch App 519; and see *Smith v Gale* [1974] 1 All ER 401, [1974] 1 WLR 9; *Greenbank v Pickles* [2001] 1 EGLR 1, (2000) Times, 7 November, CA. It is not the very essence and substance of the contract, so that no contract can be made out except through the medium of the arbitrators (*Dinham v Bradford* at 523 per Lord Hatherley LC; approved in *Hordern v Hordern* [1910] AC 465 at 474, PC); but in *Collins v Collins* (1858) 26 Beav 306, the court declined to appoint an umpire on the refusal of the parties' valuers to do so.

8 As to what is partnership land see PARAS 11, 118. Where an asset is not a partnership asset but the separate property of one or more partners, the non-owning partners can claim no lien over such an asset and a sale of that asset at the non-owning partners' instance will not be ordered: see PARA 206 note 4.

9 *Wild v Milne* (1859) 26 Beav 504; and see *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427, CA. In the absence of contrary intention, the proceeds of sale of partnership land are deemed to be personal estate: see PARA 119. It is only in rare circumstances that a sale will not be ordered: see PARA 206 note 5; but see *Stekel v Ellice* [1973] 1 All ER 465, [1973] 1 WLR 191 (where the plaintiff partner had by the terms of the partnership agreement no interest in the capital and assets of the firm).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/B. SALE BY ORDER OF THE COURT/209. Order for sale and appointment of receiver.

209. Order for sale and appointment of receiver.

A sale under an order of the court will be carried out in the manner most beneficial to the common interest¹. Such an order may be made on motion before trial, where the partnership is clearly dissolved², or even where it is not dissolved but the position of the business is daily growing worse³.

The matter is often referred to a master in order that he may consider the best course to pursue, and the best way of selling⁴. When one partner has a greatly preponderant interest in the concern, liberty may be given to him to submit proposals for the purchase of the shares of the other partners⁵.

The court may give liberty to all or any of the partners to bid, but in that event the conduct of the sale is not given to those who have such liberty; nor may they interfere in any way with the sale⁶.

If necessary, a receiver and manager may be appointed until sale⁷. If the receiver conducts the sale, he is subject to the court's directions⁸ and is not invariably bound to accept the highest price for the property⁹.

1 *Re Coles, Leaf v Coles* (1851) 1 De GM & G 171; *Taylor v Neate* (1888) 39 ChD 538.

2 *Crawshay v Maule* (1818) 1 Swan 495; cf *Broadwood v Goding* (1835) 5 LJ Ch 96.

3 *Bailey v Ford* (1843) 13 Sim 495. See PARA 208 text and note 4.

4 *Wilson v Greenwood* (1818) 1 Swan 471; *Crawshay v Maule* (1818) 1 Swan 495 at 529; *Madgwick v Wimble* (1843) 6 Beav 495 at 502; *Re Coles, Leaf v Coles* (1851) 1 De GM & G 171; cf *Blyth v Blyth* (1861) 4 LT 536. To avoid publicity and expense, the master has sometimes by consent held a private auction in chambers, the parties being the sole bidders.

5 *Syers v Syers* (1876) 1 App Cas 174 at 183, HL (inquiry directed as to what was the value of the interest of the other partners); and see *Latchan v Martin* (1984) 134 NLJ 745, PC; and PARA 206. Note that the exercise of this power not to order a genuine sale (as opposed merely to authorising the buying out a partner's share) conflicts with a partner's fundamental right, upon a dissolution, to have the assets of the partnership sold: see the Partnership Act 1890 s 39; and PARAS 142, 206.

6 *Wild v Milne* (1859) 26 Beav 504; *Dean v Wilson* (1878) 10 ChD 136; and see *Rowlands v Evans* (1861) 30 Beav 302.

7 *Waters v Taylor* (1813) 2 Ves & B 299 (court allowed the parties to submit proposals for the interim management of an opera house); and see *Rowlands v Evans* (1861) 30 Beav 302. Despite earlier authority to the contrary (see *Harding v Glover* (1810) 18 Ves 281), it now appears that the appointment of a receiver where it is clear that the firm must be dissolved or has been dissolved is almost a matter of course: *Sobell v Boston* [1975] 2 All ER 282 at 286, [1975] 1 WLR 1587 at 1591 per Goff J; but see *Pini v Roncoroni* [1892] 1 Ch 633 (where, notwithstanding the headnote to the report, a receiver was appointed and the other matters in dispute were referred to arbitration). Cf *Tottey v Kemp* (1970) 215 Estates Gazette 1021, where Megarry J, although acknowledging the principle, refused to appoint a receiver because the respondent partner was exercising an option to purchase the whole undertaking. As to the appointment of a receiver before dissolution see PARA 163; and **RECEIVERS** vol 39(2) (Reissue) PARA 338.

8 See *McGowan v Chadwick* [2002] EWCA Civ 1758, [2002] All ER (D) 45 (Dec) (where the receiver was accused of breach of duty it was held that the court has discretion whether to grant permission to commence a separate claim against a receiver appointed in a partnership action, rather than to try a claim against him in the partnership action itself). As to the receiver's position generally see PARA 165.

9 He is not obliged to accept the higher offer of a tardy and vacillating bidder: *Procopi v Moschakis* (1969)
211 Estates Gazette 31.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/B. SALE BY ORDER OF THE COURT/210. Liability for loss on sale; book debts; unsaleable assets.

210. Liability for loss on sale; book debts; unsaleable assets.

In the absence of fraud, a partner who is entrusted with the winding up of the partnership affairs is not solely liable for loss resulting from an injudicious sale of the assets¹.

Book debts should be sold with the business when it is sold as a going concern². Assets which are unsaleable must be charged in the accounts at a valuation³.

1 *Cragg v Ford* (1842) 1 Y & C Ch Cas 280.

2 *Johnson v Helleley* (1864) 34 Beav 63; affd on another point 2 De GJ & Sm 446. The title of a periodical published by a partnership has been held to form part of the assets which ought to be realised, for what it may be worth, on dissolution: see *Bradbury v Dickens* (1859) 27 Beav 53. As to the disposal of goodwill generally see PARA 213.

3 This rule has been applied to emoluments from personal appointments (*Smith v Mules* (1852) 9 Hare 556), and to an unassignable mail contract held by a partner (*Ambler v Bolton* (1872) LR 14 Eq 427); but a specific undertaking which is the object of the partnership may be ordered to be carried out, and the ultimate account postponed until its completion (*McClean v Kennard* (1874) 9 Ch App 336); and see PARAS 133 note 1, 176 note 1.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/C. PAYMENT OF LOSSES AND APPLICATION OF ASSETS REALISED/211. Liability for losses.

C. PAYMENT OF LOSSES AND APPLICATION OF ASSETS REALISED

211. Liability for losses.

In the absence of contrary agreement, losses, including losses and deficiencies of capital, must be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportions in which they would be entitled to share profits¹.

Where partners agree to contribute capital in unequal shares but to divide the profits equally, and the assets prove insufficient to make good the capital, each partner is treated, unless otherwise provided, as liable to contribute an equal share of the deficiency, and then the assets are applied in paying to each partner rateably what is due to him from the firm in respect of capital².

¹ Partnership Act 1890 s 44(a). As to how losses are borne see PARA 132 et seq. Section 44 applies to the winding up of every partnership after a dissolution whatever the ground of dissolution and regardless of the conduct of the parties: *Hurst v Bryk* [2002] 1 AC 185, [2000] 2 All ER 193, HL.

² This is the logical result of the operation of the Partnership Act 1890 s 44. This was also the rule before 1890: *Wood v Scoles* (1866) 1 Ch App 369; *Binney v Mutrie* (1886) 12 App Cas 160, PC. As to the rather more complex position where one of the partners is insolvent and thus unable to contribute his share see *Garner v Murray* [1904] 1 Ch 57. As to the rule that a partnership share is a share in the net assets only see PARA 122.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/C. PAYMENT OF LOSSES AND APPLICATION OF ASSETS REALISED/212. Application of assets after dissolution.

212. Application of assets after dissolution.

In settling accounts between the partners after a dissolution of partnership, the firm's assets, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, are applicable in the following manner and order¹:

- 37 (1) in payment of the firm's debts and liabilities to persons who are not partners²;
- 38 (2) in repaying to each partner rateably what is due from the firm to him for advances as distinct from capital³;
- 39 (3) in repaying to each partner rateably what is due from the firm to him in respect of capital⁴; and
- 40 (4) in dividing any residue among the partners in the proportion in which profits are divisible⁵.

In the absence of contrary agreement, the amount payable by the other partners in respect of the share of a deceased or outgoing partner is a debt from the other partners accruing at the date of death or dissolution, as the case may be⁶.

1 As to the priority of debts in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 573 et seq. As to the postponement to other liabilities of the costs of taking a partnership account see PARA 161.

2 Partnership Act 1890 s 44(b)1.

3 Partnership Act 1890 s 44(b)2. No common law action for money lent lies in respect of money advanced by a partner to the partnership: *Green v Hertzog* [1954] 1 WLR 1309, CA. See also PARAS 5 note 1, 136, 158.

4 Partnership Act 1890 s 44(b)3.

5 Partnership Act 1890 s 44(b)4; *Binney v Mutrie* (1886) 12 App Cas 160, PC.

6 Partnership Act 1890 s 43.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/D. DISPOSAL OF GOODWILL/213. Goodwill generally; right to use name; sale to a partner.

D. DISPOSAL OF GOODWILL

213. Goodwill generally; right to use name; sale to a partner.

The goodwill of the business carried on by a partnership forms part of the assets to be realised on dissolution¹. If the goodwill is not sold, each partner may use the name of the firm, if by doing so he does not hold out the other partners as still being partners with him². If a partner agrees to retire, and if on the construction of the agreement under which he retires, although his partners buy his share, they do not take any express assignment of the goodwill, they are not entitled to continue the use of his name as part of the firm name³; and, where a business is carried on under the name, solely or with any addition, of an outgoing partner who is still living and not bankrupt, a purchaser of the business including the goodwill is not entitled to use the name of the outgoing partner in such a way as to suggest that he is still connected with the business⁴, unless the right to use the firm name is expressly assigned⁵. On dissolution, a partner may advertise that he is no longer connected with a periodical that the firm publishes⁶.

Where the goodwill becomes on dissolution the property of one of the partners, either by purchase in the ordinary way or pursuant to a provision in the partnership agreement⁷, the outgoing partner or partners may not carry on a similar business in the name of the old firm⁸, and may not solicit old customers⁹.

1 *Re David and Matthews* [1899] 1 Ch 378 at 382; *Hall v Barrows* (1863) 4 De GJ & Sm 150 at 159; *Johnson v Helleley* (1864) 34 Beav 63 (affd 2 De GJ & Sm 446) (book debts ordered to be sold with the business, so that the purchaser might secure the customers of the old firm); *Page v Ratcliffe* (1896) 74 LT 343 (affd (1897) 76 LT 63, CA); *Jennings v Jennings* [1898] 1 Ch 378 at 384; *Hill v Fearis* [1905] 1 Ch 466. Whether there is any goodwill or not seems to be a pure question of fact, and not of mixed law and fact: *A-G v Boden* [1912] 1 KB 539 at 559. Goodwill may exist even though it cannot be valued in money terms: see *Manley v Sartori* [1927] 1 Ch 157 at 166 per Romer J, approved in this context in *Pathirana v Pathirana* [1967] 1 AC 233 at 240, [1966] 3 WLR 666 at 671, PC; and see PARAS 203, 216. As to the position of a purchaser who takes a share in the firm see PARA 23. The grounds upon which goodwill ought to be treated and valued as a partnership asset are laid down in *Wedderburn v Wedderburn (No 4)* (1856) 22 Beav 84 at 104 per Romilly MR. In *Trego v Hunt* [1896] AC 7 at 17, 18, HL, Lord Herschell stated that it was the connection formed (by attracting customers to the business) together with the circumstances, whether of habit or otherwise, which tended to make it permanent, that constituted the goodwill of a business; and see *Churton v Douglas* (1859) John 174 at 188; and *Darby v Meehan* (1998) Times, 25 November. See also *Byford v Oliver* [2003] EWHC 295 (Ch), [2003] EMLR 416, [2003] All ER (D) 345 (Feb), where it was held all the partners had an interest in the name 'SAXON', the goodwill and all the other assets of the partnership, but that did not mean that they owned the assets themselves. In the absence of a special provision in the partnership agreement, the partners had an interest in the realised value of the partnership assets.

As to the nature of goodwill generally see **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1206 et seq. As to injunctions restraining an ex-partner from harming the goodwill after dissolution see PARA 172. As to covenants in restraint of trade contained in partnership agreements see PARA 42.

2 *Burchell v Wilde* [1900] 1 Ch 551, CA; and see *Totter v Kemp* (1970) 215 Estates Gazette 1021. As to the firm name see PARA 7. It is, however, questionable to what extent a partner may use the firm name before the firm's winding up has been completed at least where the firm name is used in order to carry on a competing business, since such competition would prima facie constitute a breach of the Partnership Act 1890 ss 29, 30 (see PARAS 107-108), as applied to partners in the period between dissolution and winding up by s 38 (see PARA 52); but see *Re David and Matthews* [1899] 1 Ch 378.

3 *Gray v Smith* (1889) 43 ChD 208, CA; and see *Jennings v Jennings* [1898] 1 Ch 378 at 384-385; *Rosher v Young* (1901) 17 TLR 347.

4 *Scott v Rowland* (1872) 26 LT 391; but see *Totley v Kemp* (1970) 215 Estates Gazette 1021.

5 *Townsend v Jarman* [1900] 2 Ch 698 at 705.

6 *Bradbury v Dickens* (1859) 27 Beav 53.

7 It would not appear to matter for this purpose whether or not any adequate consideration is given to the retiring partner for his share of goodwill: *Bridge v Deacons (a firm)* [1984] AC 705, sub nom *Deacons (a firm) v Bridge* [1984] 2 All ER 19, PC.

8 *Jennings v Jennings* [1898] 1 Ch 378; *Trego v Hunt* [1896] AC 7, HL (overruling *Pearson v Pearson* (1884) 27 ChD 145, CA); *Re David and Matthews* [1899] 1 Ch 378; *Churston v Douglas* (1859) John 174; cf *Gillingham v Biddow* [1900] 2 Ch 242 (provision in a partnership agreement that an outgoing partner might set up a similar business in the neighbourhood held to be merely declaratory, and not to authorise the solicitation of old customers). A partner may be restrained from advertising that the firm's publication will be discontinued, if it ought to be sold as an asset: *Bradbury v Dickens* (1859) 27 Beav 53. As to the rights and restrictions affecting a vendor of goodwill generally see **COMPETITION** vol 18 (2009) PARA 373 et seq.

9 *Trego v Hunt* [1896] AC 7, HL, approving *Labouchere v Dawson* (1872) LR 13 Eq 322, and *Leggott v Barrett* (1880) 15 ChD 306, CA; *Re David and Matthews* [1899] 1 Ch 378; and see further the cases cited in PARA 172. In *Boorne v Wicker* [1927] 1 Ch 667, the rule was extended to a vendor's executors. The partner may carry on business with the firm's old customers, provided that he does not canvass them: see the cases cited in note 8; and *Curl Bros Ltd v Webster* [1904] 1 Ch 685. The rule against canvassing does not extend to a partner expelled under the firm's partnership agreement (*Dawson v Beeson* (1882) 22 ChD 504, CA; although, where the expelled partner has been paid the value of his share in the firm's goodwill, quare whether there is any reason in principle why he should be treated more leniently than any other outgoing partner); or to a purchaser from the trustee in bankruptcy of an expelled partner (*Walker v Mottram* (1881) 19 ChD 355, CA; and see *Mogford v Courtenay* (1881) 45 LT 303); or to a partner whose property has been sold for the benefit of his creditors (*Green & Sons (Northampton) Ltd v Morris* [1914] 1 Ch 562; *Farey v Cooper* [1927] 2 KB 384, CA).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/D. DISPOSAL OF GOODWILL/214. Valuation of goodwill.

214. Valuation of goodwill.

An agreement that on dissolution the partnership assets are to be taken by one partner includes goodwill¹; and, where the outgoing partner will not be the subject of any covenant in restraint of trade², it must be valued on the footing that the outgoing partner is entitled to carry on a similar business³.

1 Cf *Chapman v Heyman* (1885) 1 TLR 397 (where, upon the construction of the partnership agreement in question, it was held that the expelled partner was not entitled to his share of the firm's goodwill, although he was entitled to the full value of his share of the other partnership assets). Where after a general dissolution one partner retained the firm's assets without the other partner's agreement, it has been held (in the exceptional circumstances of the case) that the former holds those assets upon a constructive trust: *Roxburgh Dinardo & Partners' Judicial Factor v Dinardo* 1992 GWD 6-322, Ct of Sess.

2 As to covenants in restraint of trade see PARAS 42, 172; and **COMPETITION** vol 18 (2009) PARA 377 et seq.

3 *Hall v Barrows* (1863) 4 De GJ & Sm 150; *Reynolds v Bullock* (1878) 47 LJ Ch 773; *Re David and Matthews* [1899] 1 Ch 378; and see *Mellersh v Keen* (1859) 27 Beav 236 at 241; *Kirby (Inspector of Taxes) v Thorn EMI plc* [1988] 2 All ER 947, [1988] 1 WLR 445, CA; and PARA 213.

As to the limits to the right of an outgoing partner to use the firm name and solicit customers of the firm where the continuing partners have acquired the outgoing partner's share of goodwill see PARA 213.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/D. DISPOSAL OF GOODWILL/215. Partners restrained from competing with business of old firm.

215. Partners restrained from competing with business of old firm.

On a sale by the court, otherwise than to a partner¹, it is usual and proper to state in the particulars of conditions of sale that the vendors are to be at liberty to carry on a similar business². It follows that the value of the goodwill, as an asset to be disposed of, is enhanced if the outgoing partners are bound by contract not to carry on a similar business. It is a question of construction, usually of the vendor partner's partnership agreement, whether or not they are so bound³. A vendor of the goodwill, whether a partner or not, may preclude himself by contract from using the name of the firm⁴.

¹ As to sale of goodwill to a partner see PARA 213.

² *Johnson v Helleley* (1864) 34 Beav 63; affd 2 De GJ & Sm 446. For the decree in *Cook v Collingridge* (1823) Jac 607, in which the principles applicable to the valuation of goodwill as an asset on the sale of a partnership were laid down by Lord Eldon LC, see 27 Beav 456.

³ *Cooper v Watson* (1784) 3 Doug KB 413 (sub nom *Cooper v Watlington* 2 Chit 451); *Kennedy v Lee* (1817) 3 Mer 441 at 455.

⁴ *Mrs Pomeroy Ltd v Scalé* (1906) 23 TLR 170. Whether a person selling a share in a business under a power of attorney is authorised to bind his principal not to carry on a competing business was discussed, but not decided, in *Hawksley v Outram* [1892] 3 Ch 359 at 375, 378, 381, CA. A covenant, unlimited as regards space, not to carry on business in a specified name is not void as being in restraint of trade: *Vernon v Hallam* (1886) 34 ChD 748 at 751. As to covenants in restraint of trade and their enforcement by the court generally see PARAS 42, 172; and **COMPETITION** vol 18 (2009) PARA 377 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/D. DISPOSAL OF GOODWILL/216. When goodwill is to be treated as an asset.

216. When goodwill is to be treated as an asset.

Generally, the firm's goodwill is treated as one of its assets¹ and the fact that it is not included in the annual balance sheet drawn up for the firm does not mean that it does not exist as such a partnership asset². Where, however, the value of the share of a deceased partner is by agreement governed by the firm's annual balance sheet, and such balance sheet in accordance with the partnership agreement does not include the firm's goodwill as an asset, his estate is not entitled to treat the goodwill as an asset³.

Where a surviving partner sells the partnership business, the estate of his deceased partner is entitled to a share of the purchase money representing the value, if any, of the goodwill; but, having regard to the rights of the surviving partners to carry on a similar business, this value may be infinitesimal⁴.

There are statutory restrictions on the sale of the goodwill of medical practices⁵, but these do not affect the enforceability of a covenant in restraint of trade⁶.

1 As to partnership property generally see PARA 116 et seq. As to the method in which such assets may be treated in the firm's annual accounts see PARAS 116 note 1, 136 note 8, 155.

2 *Wade v Jenkins* (1860) 2 Giff 509. See also the statement of Romilly MR in *Wedderburn v Wedderburn* (No 4) (1856) 22 Beav 84 at 104; and PARA 213.

3 *Hunter v Dowling* [1895] 2 Ch 223; *Scott v Scott* (1903) 89 LT 582, following *Steuart v Gladstone* (1878) 10 ChD 626, CA; cf *Cruickshank v Sutherland* (1922) 92 LJ Ch 136, HL (where the annual accounts, being framed according to the firm's usual practice but contrary to the method prescribed by the partnership agreement, were held not binding upon a deceased partner's executors); and see PARA 155.

4 *Smith v Everett* (1859) 27 Beav 446; cf *Mellersh v Keen* (1859) 27 Beav 236. It was at one time considered that, on the death of a partner, the goodwill belonged exclusively to the surviving partners (*Hammond v Douglas* (1800) 5 Ves 539; *Lewis v Langdon* (1835) 7 Sim 421), but it is now settled that it forms part of the assets of the firm in which the estate of the deceased partner is entitled to share, and, in the absence of contrary agreement, the executors of the deceased partner are entitled to have it sold with the other assets (*Re David and Matthews* [1899] 1 Ch 378 at 382; and see PARA 213).

5 See the National Health Service Act 2006 s 259, Sch 21; and **HEALTH SERVICES** vol 54 (2008) PARA 273.

6 *Kerr v Morris* [1987] Ch 90, [1986] 3 All ER 217, CA, overruling *Hensman v Traill* (1980) 124 Sol Jo 776. An injunction may be granted to prevent breach: see PARA 172.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/4. DISSOLUTION/(6) WINDING UP THE PARTNERSHIP BUSINESS/(iii) Realisation and Disposal of Assets/D. DISPOSAL OF GOODWILL/217. Agreement for retention of goodwill.

217. Agreement for retention of goodwill.

A partnership agreement may contain provisions which entitle surviving partners to retain the benefit of the goodwill upon terms as, for example, the payment of a share of profits to the estate of the deceased partner. It is, however, a question of construction in each case whether the provisions in the partnership agreement have that effect or not¹; and the court will give effect to a provision in the partnership agreement that goodwill is not to be valued on the assets being taken over by a surviving partner². In any event, the partnership agreement may restrain an ex-partner from competing with the firm³.

1 *Smith v Nelson* (1905) 92 LT 313.

2 *Hordern v Hordern* [1910] AC 465, PC. See also PARA 216.

3 See PARAS 42, 215.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/(1) CONSTITUTION/218. Statutory creation.

5. LIMITED PARTNERSHIPS

(1) CONSTITUTION

218. Statutory creation.

The Limited Partnerships Act 1907 authorised the formation of limited partnerships¹, and thus rendered it possible for the first time for a person to become a partner upon the terms that his liability to the creditors of the firm should be strictly limited, like that of a shareholder in a limited company². A limited partner is in the position of a sleeping partner with limited liability³.

1 Limited Partnerships Act 1907 ss 1, 4(1). As from a day to be appointed, the Limited Partnerships Act 1907 is repealed in relation to Northern Ireland (see the Companies Act 2006 s 1286(2)(b) (not yet in force)), and the enactments in force in Great Britain relating to limited partnerships are extended to Northern Ireland (see s 1286(1) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

2 See PARA 3. As to limited liability of shareholders see **COMPANIES** vol 14 (2009) PARAS 78, 102.

3 As to the meaning of 'limited partner' see PARA 219. As to the meaning of 'sleeping partner' see PARA 4.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/(1) CONSTITUTION/219. Limited partners and general partners.

219. Limited partners and general partners.

A limited partnership must consist of one or more persons called 'general partners', who are liable for all debts and obligations of the firm¹, and one or more persons called 'limited partners', who must at the time of entering into such partnership contribute to it a sum or sums as capital or property valued at a stated amount, and who are not liable² for the debts or obligations of the firm beyond that amount³. A body corporate may be a limited partner⁴.

The terms 'firm'⁵, 'firm name'⁶ and 'business'⁷ have the same meanings as in the Partnership Act 1890⁸.

A limited partnership, like an ordinary partnership, is not a legal entity⁹.

1 A general partner is defined by the Limited Partnerships Act 1907 as any partner other than a limited partner: s 3. General partners are, in effect, managing partners.

2 ie unless they act in such a way as to deprive themselves of the privileges of a limited partner: see the Limited Partnerships Act 1907 ss 4(3), 6(1); and PARA 226.

3 Limited Partnerships Act 1907 s 4(2) (amended by the Banking Act 1979 ss 46(b), 51(2), Sch 7; and SI 2002/3203). This limited liability applies only vis-à-vis third party creditors of the firm; as between members of a firm a limited partner's liability may not be thus limited: *Reed (Inspector of Taxes) v Young* [1986] 1 WLR 649, HL. As to the powers and liabilities of limited partners see PARA 226.

4 Limited Partnerships Act 1907 s 4(4).

5 As to the meaning of 'firm' see the Partnership Act 1890 s 4(1); and PARA 1.

6 As to the meaning of 'firm name' see the Limited Partnerships Act 1907 s 4(1); and PARA 1 note 3.

7 As to the meaning of 'business' see the Limited Partnerships Act 1907 s 45; and PARA 6.

8 Limited Partnerships Act 1907 s 3.

9 See *Re Barnard, Martins Bank v Trustee* [1932] 1 Ch 269 at 272; and PARA 2.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/(1) CONSTITUTION/220. The statutory rules and regulations.

220. The statutory rules and regulations.

The Secretary of State¹ may make rules concerning any of the following matters:

- 41 (1) the duties or additional duties to be performed by the Registrar of Companies for the purposes of the Limited Partnerships Act 1907²;
- 42 (2) the performance by assistant registrars and other officers of acts by the Act required to be done by the registrar³;
- 43 (3) the forms to be used for the purposes of the Act⁴;
- 44 (4) generally, the conduct and regulation of registrations under the Act and any matters incidental thereto⁵.

The Limited Partnerships Rules 1907 were made under this power⁶.

1 Under the Limited Partnerships Act 1907 s 17 this power is exercisable by the Board of Trade. In practice this power is now exercised by the Secretary of State for Business, Enterprise and Regulatory Reform: see the Secretary of State for Trade and Industry Order 1970, SI 1970/1537, arts 2(1), 7(4) (lapsed); the Secretary of State (New Departments) Order 1974, SI 1974/692, art 2(3) (lapsed); the Transfer of Functions (Trade and Industry) Order 1983, SI 1983/1127; the Secretaries of State for Children, Schools and Families, for Innovation, Universities and Skills and for Business, Enterprise and Regulatory Reform Order 2007, SI 2007/3224; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 505.

2 Limited Partnerships Act 1907 s 17(b). As to the Registrar of Companies see PARA 221 note 1; and **COMPANIES** vol 14 (2009) PARA 131 et seq.

3 Limited Partnerships Act 1907 s 17(c).

4 Limited Partnerships Act 1907 s 17(d).

5 Limited Partnerships Act 1907 s 17(e).

6 Ie the Limited Partnerships Rules 1907, SR & O 1907/1020.

UPDATE

220 The statutory rules and regulations

NOTE 1--The functions of the Secretary of State for Business, Enterprise and Regulatory Reform have been transferred to the Secretary of State for Business, Innovation and Skills: see the Secretary of State for Business, Innovation and Skills Order 2009, SI 2009/2748.

TEXT AND NOTE 6--SR & O 1907/1020 replaced by the Limited Partnerships (Forms) Rules 2009, SI 2009/2160, except in relation to matters arising under SR & O 1907/1020 r 3.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (2) REGISTRATION OF LIMITED PARTNERSHIPS/221. The register.

(2) REGISTRATION OF LIMITED PARTNERSHIPS

221. The register.

The Registrar of Companies¹ must keep a register and index of all registered limited partnerships and of all the statements registered in relation to them². On receiving any such statement, the registrar must file it and must post a certificate of registration to the firm from whom it was received³. The certificate of registration, or a copy of or extract from any registered statement, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars, must be received in evidence in all civil or criminal proceedings⁴.

Any person may inspect the filed statements and may require a certificate of the registration of any limited partnership or a certified copy of or extract from any registered statement⁵.

¹ The Registrar of Companies, as successor to the registrar of joint stock companies, is the registrar of limited partnerships: Limited Partnerships Act 1907 s 15; Companies Act 1985 ss 704, 744 (prospectively repealed by the Companies Act 2006 s 1295, Sch 16 as from a day to be appointed; at the date at which this volume states the law no such day had been appointed). See also the Companies Act 2006 s 1060 (not yet fully in force). In the registrar's absence his functions under the Limited Partnerships Act 1907 are to be performed by such person as the Secretary of State may for the time being authorise: see the Limited Partnerships Rules 1907, SR & O 1907/1020, r 2. As to the Registrar of Companies see **COMPANIES** vol 14 (2009) PARA 131 et seq. As to the Secretary of State see PARA 220 note 1.

² Limited Partnerships Act 1907 s 14. As to the statements see PARAS 222-223.

³ Limited Partnerships Act 1907 s 13.

⁴ Limited Partnerships Act 1907 s 16(2).

⁵ Limited Partnerships Act 1907 s 16(1) (amended by the Companies Act 2006 ss 1063(7)(a), 1295, Sch 16).

UPDATE

221 The register

TEXT AND NOTES 1, 2--Limited Partnerships Act 1907 s 14 amended: SI 2009/1941.

NOTE 1--Limited Partnerships Act 1907 s 15 substituted: SI 2009/1941. SR & O 1907/1020 r 2 revoked: SI 2009/2160.

NOTES 4, 5--As to the fees payable, see the Registrar of Companies (Fees) (Limited Partnerships and Newspaper Proprietors) Regulations 2009, SI 2009/2392, Sch 2, paras 4-6.

TEXT AND NOTE 4--Limited Partnerships Act 1907 s 16(2) amended: SI 2009/1941.

TEXT AND NOTE 5--Limited Partnerships Act 1907 s 16(1) amended: SI 2009/1941.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (2) REGISTRATION OF LIMITED PARTNERSHIPS/222. First registration.

222. First registration.

Every limited partnership must be registered as such with the Registrar of Companies¹, and if it is not so registered, it is deemed to be a general partnership and the limited partners are then deemed to be general partners².

The registration of a limited partnership must be effected by sending by post or delivering to the registrar at the register office in that part of the United Kingdom³ in which the principal place of business⁴ of the limited partnership is situated or proposed to be situated⁵ a statement⁶ signed by the partners containing particulars of:

- 45 (1) the firm name⁷;
- 46 (2) the general nature of the business⁸;
- 47 (3) the principal place of business⁹;
- 48 (4) the full name of each of the partners¹⁰;
- 49 (5) the term, if any, for which the partnership is entered into, and the date of its commencement¹¹;
- 50 (6) a statement that the partnership is limited, and the description of every limited partner as such¹²; and
- 51 (7) the sum contributed by each limited partner, and whether paid in cash or how otherwise¹³.

A person who knowingly and wilfully makes a statement for registration false in a material particular is guilty of an offence¹⁴.

1 As to the Registrar of Companies see PARA 221 note 1.

2 Limited Partnerships Act 1907 s 5. As to the meanings of 'limited partner' and 'general partner' see PARA 219.

3 As to the meaning of 'United Kingdom' see PARA 9 note 4.

4 As to the firm's principal place of business see PARA 88 note 3.

5 The several company registries in the different parts of the United Kingdom are the offices for the registration of limited partnerships carrying on business within those parts of the United Kingdom in which they are respectively situated: Limited Partnerships Act 1907 s 15.

6 For the prescribed form of statement see the Limited Partnerships Rules 1907, SR & O 1907/1020, r 4, Appendix, Form LP5 (substituted by SI 1974/560). In addition to the particulars specified in the text, this form requires a statement of the address of each partner; whether he is a general or a limited partner; and, if the partnership is not entered into for a definite term, the conditions of its existence. A £2 fee is payable on registration: see the Limited Partnerships Rules 1907, SR & O 1907/1020, r 3(a).

7 Limited Partnerships Act 1907 s 8(a). The Business Names Act 1985 makes no distinction between general and limited partnerships and thus applies to both types of partnerships: see PARA 8.

8 Limited Partnerships Act 1907 s 8(b).

9 Limited Partnerships Act 1907 s 8(c).

10 Limited Partnerships Act 1907 s 8(d).

11 Limited Partnerships Act 1907 s 8(e). As to the duration of partnerships see PARAS 43-44.

12 Limited Partnerships Act 1907 s 8(f).

13 Limited Partnerships Act 1907 s 8(g).

14 See the Perjury Act 1911 s 5(b). The offence is punishable on conviction on indictment by imprisonment for a term not exceeding two years, or a fine or both: s 5(b); and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 717.

UPDATE

222 First registration

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

NOTE 5--Limited Partnerships Act 1907 s 15 substituted: SI 2009/1941.

NOTE 6--SR & O 1907/1020 r 4, Appendix, Form LP5 replaced by the Limited Partnerships (Forms) Rules 2009, SI 2009/2160, Schedule Pt 1 Form LP5. The fee payable for the registration of a limited partnership has increased from £2 to £20: Registration of Companies (Fees) (Limited Partnerships and Newspaper Proprietors) Regulations 2009, SI 2009/2392, Sch 1 para 5.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (2) REGISTRATION OF LIMITED PARTNERSHIPS/223. Notice of changes in limited partnership.

223. Notice of changes in limited partnership.

If, during the continuance of a limited partnership, any change is made or occurs in the firm name¹, the general nature² or principal place³ of the business, the partners or the name of any partner⁴, the term or character of the partnership⁵, the sum contributed by any limited partner⁶, or the liability of any partner by reason of his becoming a limited partner instead of a general partner or vice versa⁷, a statement⁸ signed by the general partners of the firm⁹, specifying the nature of the change, must be sent by post or delivered to the Registrar of Companies¹⁰ within seven days for registration¹¹. If default is made in complying with the above requirements, each of the general partners is liable on summary conviction to a fine not exceeding £1 for each day during which the default continues¹².

1 Limited Partnerships Act 1907 s 9(1)(a). As to the firm name see PARA 1 note 3; definition applied by s 3. Both the previous name and the new name must be stated in the notice of change. See also PARA 7.

2 Limited Partnerships Act 1907 s 9(1)(b). Both the business previously carried on and that now carried on must be notified.

3 Limited Partnerships Act 1907 s 9(1)(c). Both the previous and the new place of business must be notified. As to the principal place of business see PARA 88 note 3.

4 Limited Partnerships Act 1907 s 9(1)(d). Changes brought about by death, transfer of interests, increase in the number of partners or change of name of any partner must be notified.

5 Limited Partnerships Act 1907 s 9(1)(e). Both the previous and the new terms must be notified. If there is or was no definite term, the previous and new conditions under which the partnership was and is now constituted must be notified.

6 Limited Partnerships Act 1907 s 9(1)(f). Any variation in the sum contributed by any limited partner must be notified. As to the meaning of 'limited partner' see PARA 219.

7 Limited Partnerships Act 1907 s 9(1)(g). As to the meaning of 'general partner' see PARA 219.

8 For the prescribed form of statement see the Limited Partnerships Rules 1907, SR & O 1907/1020, r 4, Appendix, Form LP6 (substituted by SI 1974/560). In addition to the particulars specified in the text and notes 1-7, a statement of increase in capital contributions must be notified: see the Limited Partnerships Rules 1907, SR & O 1907/1020, Appendix, notes to Form LP 6 (as so substituted).

9 It would appear that limited partners have no authority to sign such a statement: see the Limited Partnerships Act 1907 s 6(1); and PARA 226.

10 As to the registrar see PARA 221 note 1.

11 Limited Partnerships Act 1907 s 9(1). The fee formerly payable on the registration of any change has been abolished: Limited Partnerships Rules 1907, SR & O 1907/1020, r 3(b) (revoked by SI 1972/1040).

12 Limited Partnerships Act 1907 s 9(2). It is unclear whether failure to register a change invalidates the status of the limited partnership.

UPDATE

223 Notice of changes in limited partnership

TEXT AND NOTES 1-11--Limited Partnerships Act 1907 s 9(1) amended: SI 2009/1941.

NOTE 8--SR & O 1907/1020 r 4, Appendix, Form LP6 replaced by the Limited Partnerships (Forms) Rules 2009, SI 2009/2160, Schedule Pt 2 Form LP6.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (2) REGISTRATION OF LIMITED PARTNERSHIPS/224. Advertisement of changes.

224. Advertisement of changes.

Notice of any arrangement or transaction by which a general partner becomes a limited partner¹, or of the assignment of the share of a limited partner to any person, must be advertised in the London, Edinburgh or Belfast Gazette, according to whether the limited partnership is registered in England, Scotland or Northern Ireland². Until so advertised, the arrangement or transaction is deemed to be of no effect for the purposes of the Limited Partnerships Act 1907³.

1 As to the meanings of 'limited partner' and 'general partner' see PARA 219.

2 Limited Partnerships Act 1907 s 10(1), (2); General Adaptation of Enactments (Northern Ireland) Order 1921, SR & O 1921/1804, art 7; Government of Ireland (Miscellaneous Adaptations) (Northern Ireland) Order 1923, SR & O 1923/803, art 3. See PARA 218 note 1.

3 Limited Partnerships Act 1907 s 10(1).

UPDATE

224 Advertisement of changes

NOTE 2--Limited Partnerships Act 1907 s 10(2) amended: SI 2009/1941.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (3) MODIFICATIONS OF THE GENERAL LAW OF PARTNERSHIP/225. Application of the general law of partnership.

(3) MODIFICATIONS OF THE GENERAL LAW OF PARTNERSHIP

225. Application of the general law of partnership.

Subject to the provisions of the Limited Partnerships Act 1907, the Partnership Act 1890¹ and the rules of equity and of common law applicable to partnerships, except so far as they are inconsistent with the express provisions of the Partnership Act 1890, apply to limited partnerships².

¹ See PARA 1 et seq.

² Limited Partnerships Act 1907 s 7; and see eg *Mephistopheles Debt Collection Service (a firm) v Lotay* [1994] 1 WLR 1064, [1995] 1 BCLC 41, CA. As to the necessity for registration see PARA 222.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (3) MODIFICATIONS OF THE GENERAL LAW OF PARTNERSHIP/226. Powers and liabilities of limited partner.

226. Powers and liabilities of limited partner.

A limited partner¹, personally or by his agent, may at any time inspect the firm's books and examine into the state and prospects of the partnership business, and may advise with the other partners thereon², but he must not take any other part in the management of the business, and he has no power to bind the firm³; nor may he draw out or receive back any part of his capital either directly or indirectly⁴.

So long as he complies with these provisions, a limited partner is liable for the firm's debts and obligations only to the extent of his capital⁵. However, if he does draw out or receive back any part of his capital either directly or indirectly, he is liable for the firm's debts and obligations to the extent of the amount so drawn out or received back⁶. If he takes part in the management for any period, he is liable as though he were a general partner for all the firm's debts and obligations incurred during that period⁷.

1 As to the meaning of 'limited partner' see PARA 219.

2 Limited Partnerships Act 1907 s 6(1) proviso.

3 Limited Partnerships Act 1907 s 6(1). Cf PARAS 110-111.

4 Limited Partnerships Act 1907 s 4(3).

5 See the Limited Partnerships Act 1907 s 4(2); and PARA 219. As to a limited partner's liability on the firm's insolvency see PARA 233.

6 Limited Partnerships Act 1907 s 4(3).

7 Limited Partnerships Act 1907 s 6(1). As to the meaning of 'general partner' see PARA 219. This is the principal practical disadvantage of a limited partnership as compared with a limited company: see **COMPANIES** vol 14 (2009) PARA 102. As to the enforcement of judgments against the firm see *Practice Direction-- Enforcement of Judgments and Orders* PD70 para 6A; and PARA 92.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (3) MODIFICATIONS OF THE GENERAL LAW OF PARTNERSHIP/227. Insolvency, death or mental disorder of limited partner.

227. Insolvency, death or mental disorder of limited partner.

A limited partnership is not dissolved by the bankruptcy or death of an individual limited partner¹, or by the insolvency of a corporate limited partner². The limited partner's capital vests in his trustee in bankruptcy, his personal representative or the liquidator, as the case may be, who has, apparently, rights similar to those of an assignee of a share in an ordinary partnership³.

If a limited partner becomes mentally disordered, that event is not of itself a ground for dissolution of the partnership by the court unless his share cannot otherwise be ascertained and realised⁴.

1 Limited Partnerships Act 1907 s 6(2). Cf PARAS 174, 181 et seq. As to the meaning of 'limited partner' see PARA 219.

2 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 423; **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 338.

3 These rights are limited: see PARA 125 et seq.

4 Limited Partnerships Act 1907 s 6(2). The Partnership Act 1890 s 35(a), which provided that the court could dissolve a partnership if a partner became permanently of unsound mind, was repealed by the Mental Health Act 1959 s 149 (2), Sch 8 Pt I. As to the power of the Court of Protection to dissolve a partnership of which a mental patient is a member see PARA 184.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (3) MODIFICATIONS OF THE GENERAL LAW OF PARTNERSHIP/228. Special powers of a majority of general partners.

228. Special powers of a majority of general partners.

Subject to any express or implied agreement between the partners, any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the general partners¹ instead of a majority of all the partners, as in the case of an ordinary partnership². Subject to any such agreement, the general partners may admit new partners without the consent of the existing limited partners³, whereas, in the case of an ordinary partnership, the consent of all the partners is required⁴.

1 Limited Partnerships Act 1907 s 6(5)(a). As to the meaning of 'general partner' see PARA 219.

2 See the Partnership Act 1890 s 24(8); and PARA 110.

3 Limited Partnerships Act 1907 s 6(5)(d). As to the meaning of 'limited partner' see PARA 219.

4 See the Partnership Act 1890 s 24(7); and PARA 112.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (3) MODIFICATIONS OF THE GENERAL LAW OF PARTNERSHIP/229. Assignment of or charge on share of limited partner.

229. Assignment of or charge on share of limited partner.

A person to whom a limited partner¹ assigns his share with the consent of the general partners² stands, in one important respect, in a different position from the assignee of a share in an ordinary partnership³. Subject to any express or implied agreement between the partners, he becomes a limited partner, and has all the rights previously belonging to the assignor⁴.

Subject to any such agreement, if the share of a limited partner becomes charged to secure his separate debt, this does not, as in the case of an ordinary partnership⁵, entitle the other partners to dissolve the partnership⁶.

1 As to the meaning of 'limited partner' see PARA 219.

2 As to the meaning of 'general partner' see PARA 219.

3 See the Partnership Act 1890 s 31; and PARAS 125-126.

4 Limited Partnerships Act 1907 s 6(5)(b).

5 See the Partnership Act 1890 s 33(2); and PARA 98. Cf s 23(2); and PARA 95.

6 Limited Partnerships Act 1907 s 6(5)(c).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (3) MODIFICATIONS OF THE GENERAL LAW OF PARTNERSHIP/230. No right to dissolve by notice.

230. No right to dissolve by notice.

Subject to any express or implied agreement between the partners, a limited partner¹ is precluded from exercising the usual right of a partner in an ordinary partnership at will² to dissolve the partnership by notice³.

1 As to the meaning of 'limited partner' see PARA 219.

2 As to the power of a general partner to dissolve a partnership at will by notice see the Partnership Act 1890 ss 26, 32(c); and PARA 174 et seq. As to partnerships at will see PARA 43.

3 Limited Partnerships Act 1907 s 6(5)(e).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (3) MODIFICATIONS OF THE GENERAL LAW OF PARTNERSHIP/231. Winding up limited partnership on dissolution.

231. Winding up limited partnership on dissolution.

Unless the court otherwise orders, the affairs of a limited partnership are, on dissolution, to be wound up by the general partners¹. In so doing, they must, subject to the provisions of the Limited Partnerships Act 1907, be guided by the rules applicable to the winding up of an ordinary partnership, treating the limited partners as sleeping partners².

1 Limited Partnerships Act 1907 s 6(3). As to the winding up of an insolvent limited partnership see PARA 233. As to the meaning of 'general partner' see PARA 219.

2 This follows from the Limited Partnerships Act 1907 s 7 (see PARA 225), which, in effect, renders the provisions governing an ordinary partnership applicable to a limited partnership in cases not specially provided for by the Act. As to the meaning of 'limited partner' see PARA 219. As to the winding up of ordinary partnerships see PARA 198 et seq.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (3) MODIFICATIONS OF THE GENERAL LAW OF PARTNERSHIP/232. Dissolution by the court.

232. Dissolution by the court.

Like an ordinary partnership, a limited partnership may be dissolved by the court in the exercise of its ordinary jurisdiction¹.

¹ See PARA 181. As to costs see *Re Beer, Brewer and Bowman* (1915) 113 LT 990.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/5. LIMITED PARTNERSHIPS/ (3) MODIFICATIONS OF THE GENERAL LAW OF PARTNERSHIP/233. Insolvent partnerships.

233. Insolvent partnerships.

Limited partnerships are governed by the ordinary law of insolvency as applied to insolvent partnerships¹. However, the following specific provision is also made in relation to limited partnerships. Where there is a creditor's petition for the winding up of an insolvent partnership as an unregistered company and there are concurrent petitions presented against one or more members, then the court may dismiss the petition against an insolvent member who is a limited partner, if the member lodges in court for the benefit of the creditors of the partnership sufficient money or security to the court's satisfaction to meet his liability for the debts and obligations of the partnership, or the member satisfies the court that he is no longer under any liability in respect of the debts and obligations of the partnership². The same provision is made in the case of a member's petition for winding up where there are concurrent petitions presented against all members³. A joint bankruptcy petition may be presented to the court by all the members of an insolvent partnership in their capacity as such provided that all the members are individuals and none of them is a limited partner⁴.

The liability of a limited partner as contributory will be limited to the extent of his contribution⁵.

1 Save as mentioned in the text to notes 2-4, the Insolvent Partnerships Order 1994, SI 1994/2421, does not distinguish between limited and ordinary partnerships. As to insolvent partnerships see **PARA 99**; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) **PARAS 1166-1301**.

2 See the Insolvency Act 1986 s 125A(7) (added as a modification by SI 1994/2421); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) **PARA 1228**.

3 See the Insolvency Act 1986 s 125A(7) (added as a modification by SI 1994/2421); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) **PARA 1263**.

4 See the Insolvency Act 1986 s 264 (modified by SI 1994/2421). This provision is subject to the Insolvency Act 1986 s 266 (as modified): see the Insolvent Partnerships Order 1994, SI 1994/2421, art 11(3), Sch 7 para 2. See further **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) **PARA 1267**.

5 See the Limited Partnerships Act 1907 s 4(2); and **PARA 226**.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/(1) INCORPORATION AND MEMBERSHIP/234. Definition of the term 'limited liability partnership'.

6. LIMITED LIABILITY PARTNERSHIPS

(1) INCORPORATION AND MEMBERSHIP

234. Definition of the term 'limited liability partnership'.

A limited liability partnership¹ is a body corporate, with legal personality separate from that of its members², which is formed by being incorporated under the Limited Liability Partnerships Act 2000³. A limited liability partnership has unlimited capacity⁴.

1 The legal entity known as the limited liability partnership was created by the Limited Liability Partnerships Act 2000 ss 1(1), 19; Limited Liability Partnerships Act 2000 (Commencement) Order 2000, SI 2000/3316. As from 1 October 2008, these enactments will apply to Northern Ireland and the Limited Liability Partnerships Act (Northern Ireland) 2002 is to be repealed: see the Companies Act 2006 s 1286 (not yet fully force): see the Companies Act 2006 (Commencement No 7, Transitional Provisions and Savings) Order 2008, SI 2008/1886, art 2.

2 Cf ordinary partnerships; and PARA 2. As to membership of limited liability partnerships see PARA 239 et seq.

3 Limited Liability Partnerships Act 2000 ss 1(2), 18. As to incorporation generally see PARA 235.

4 Limited Liability Partnerships Act 2000 s 1(3).

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom. 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/(1) INCORPORATION AND MEMBERSHIP/235. Incorporation.

235. Incorporation.

For a limited liability partnership¹ to be incorporated:

- 52 (1) two or more persons who are associated for the carrying on of a lawful business² with a view to profit must have subscribed their names to an incorporation document³;
- 53 (2) there must have been delivered to the Registrar of Companies⁴ either the incorporation document or a copy authenticated in a manner approved by him⁵; and
- 54 (3) a statement, in a form approved by the registrar and made, either by a solicitor engaged in the formation of the limited liability partnership or anyone who subscribed his name to the incorporation document, must also be delivered to the registrar confirming that there has been compliance with head (1) above⁶.

A fee must be paid to the registrar on incorporation⁷.

The incorporation document of a limited liability partnership must (a) be in a form approved by the registrar, or as near to such a form as circumstances allow⁸; (b) state the name of the limited liability partnership⁹; (c) state whether the registered office of the limited liability partnership is to be situated in England and Wales or in Wales¹⁰; (d) state the address of that registered office¹¹; (e) state the name¹² and address¹³ of each of the persons who are to be members of the limited liability partnership on incorporation¹⁴; and (f) either specify which of those persons are to be designated members¹⁵ or state that every person who from time to time is a member of the limited liability partnership is a designated member¹⁶.

Once the incorporation document (or an authenticated copy of it) and the statement confirming that the persons carrying on the lawful business have subscribed their names to the incorporation document have both been delivered to the registrar¹⁷, the registrar must retain the incorporation document (or copy) delivered to him and he must register the incorporation document or copy, and give a certificate that the limited liability partnership is incorporated by the name specified in the incorporation document¹⁸. The certificate must either be signed by the registrar or be authenticated by his official seal¹⁹, and is conclusive evidence that the statutory requirements²⁰ are complied with and that the limited liability partnership is incorporated by the name specified in the incorporation document²¹.

1 As to the meaning of 'limited liability partnership' see PARA 234.

2 'Business' includes every trade, profession and occupation: Limited Liability Partnerships Act 2000 s 18.

3 Limited Liability Partnerships Act 2000 s 2(1)(a). As to the incorporation document see the text and notes 8-16.

4 'Registrar' means, if the registered office of the limited liability partnership is, or is to be, situated in England and Wales or in Wales, the registrar or other officer performing under the Companies Act 1985 the duty of registration of companies in England and Wales: Limited Liability Partnerships Act 2000 s 18. As to the Registrar of Companies see PARA 221 note 1; and **COMPANIES** vol 14 (2009) PARA 131 et seq.

5 Limited Liability Partnerships Act 2000 s 2(1)(b).

6 Limited Liability Partnerships Act 2000 s 2(1)(c). A person who makes such a statement knowing that it is false or not believing it to be true is guilty of an offence: Limited Liability Partnerships Act 2000 s 2(3). A person

guilty of such an offence is liable, on summary conviction, to imprisonment for a period not exceeding six months or a fine not exceeding the statutory maximum, or to both, or on conviction on indictment, to imprisonment for a period not exceeding two years or a fine, or to both: s 2(4). The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. 'Prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141.

7 The fee for registration under s 2 is £50 for same day registration, and £20 for other than same day registration: Limited Liability Partnerships (Fees) Regulations 2004, SI 2004/2620, reg 4, Sch 3, Fee 1.

8 Limited Liability Partnerships Act 2000 s 2(2)(a).

9 Limited Liability Partnerships Act 2000 s 2(2)(b). As to the name of a limited liability partnership see PARA 237.

10 Limited Liability Partnerships Act 2000 s 2(2)(c). As to the registered office of a limited liability partnership see PARA 238.

11 Limited Liability Partnerships Act 2000 s 2(2)(d).

12 'Name' in relation to a member of a limited liability partnership means, if an individual, his forename and surname, or in the case of a peer or other person usually known by a title, his title instead of or in addition to either or both his forename and surname, and if a corporation, its corporate name: Limited Liability Partnerships Act 2000 s 18.

13 'Address' in relation to a member of a limited liability partnership means, if an individual, his usual residential address, and if a corporation, its registered or principal office: Limited Liability Partnerships Act 2000 s 18. Where a confidentiality order, made under the Companies Act 1985 s 723B (prospectively repealed) (see **COMPANIES** vol 14 (2009) PARA 152) as applied to a limited liability partnerships by the Limited Liability Partnerships (No 2) Regulations 2002, SI 2002/913, is in force in respect of any individual named as a member of a limited liability partnership under the Limited Liability Partnerships Act 2000 s 2(2), that provision has effect as if the reference to the address of the individual were a reference to the address for the time being notified by him under the Limited Liability Partnerships (Particulars of Usual Residential Address) (Confidentiality Orders) Regulations 2002, SI 2002/915, to any limited liability partnership of which he is a member, or, if he is not such a member, either the address specified in his application for a confidentiality order or the address last notified by him under such a confidentiality order as the case may be: Limited Liability Partnerships Act 2000 s 2(2A) (s 2(2A), (2B) added by SI 2002/915). As from a day to be appointed, the Companies Act 1985 s 723B is repealed by the Companies Act 2006 s 1295, Sch 16 and will be replaced by the Companies Act 2006 ss 240-246 (not yet in force). At the date at which this volume states the law no such day had been appointed. Where the incorporation document or a copy of such includes an address specified in reliance on the Limited Liability Partnerships Act 2000 s 2(2A) there must be delivered with it or the copy of it a statement in a form approved by the registrar containing particulars of the usual residential address of the member whose address is so specified: s 2(2B) (as so added). As to the procedure for applying for confidentiality orders and as to the duration, renewal and revocation of such orders generally see the Limited Liability Partnerships (Particulars of Usual Residential Address) (Confidentiality Orders) Regulations 2002, SI 2002/915; and the Limited Liability Partnerships (Competent Authority) (Fees) Regulations 2002, SI 2002/503.

14 Limited Liability Partnerships Act 2000 s 2(2)(e).

15 As to designated members see PARA 240.

16 Limited Liability Partnerships Act 2000 s 2(2)(f).

17 Ie the requirements of the Limited Liability Partnerships Act 2000 s 2(1)(b), (c) have both been complied with: see s 3(1); and the text and notes 5-6.

18 Limited Liability Partnerships Act 2000 s 3(1). The registrar is under a duty to register the incorporation document and issue the certificate unless the persons associated for carrying on lawful business with a view to profit have not subscribed their names to the incorporation document (ie the requirement imposed by s 2(1)(a) has not been complied with): see s 3(1). The registrar may accept the statement delivered under s 2(1)(c) as sufficient evidence that this requirement has been complied with: s 3(2).

19 Limited Liability Partnerships Act 2000 s 3(3).

20 Ie that the requirements of the Limited Liability Partnerships Act 2000 s 2 are complied with: see s 3(4).

21 Limited Liability Partnerships Act 2000 s 3(4).

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

235 Incorporation

TEXT AND NOTES 1-16--Limited Liability Partnerships Act 2000 s 2 amended: SI 2009/1804.

NOTE 4--Definition of 'registrar' substituted: Limited Liability Partnerships Act 2000 s 18 (amended by SI 2009/1804).

NOTE 7--SI 2004/2620 largely replaced by the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101 (amended by SI 2009/2439).

NOTE 13--SI 2002/503 revoked: Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101. Definition of 'address' omitted: Limited Liability Partnerships Act 2000 s 18 (as amended: see NOTE 4). SI 2002/913, SI 2002/915 revoked: SI 2009/1804.

TEXT AND NOTES 17-21--Limited Liability Partnerships Act 2000 s 3 amended: SI 2009/1804.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/(1) INCORPORATION AND MEMBERSHIP/236. Property transferred to a limited liability partnership in connection with its incorporation.

236. Property transferred to a limited liability partnership in connection with its incorporation.

Stamp duty is not chargeable on an instrument¹ by which property is conveyed or transferred by a person to a limited liability partnership² in connection with its incorporation³ within the period of one year beginning with the date of incorporation if the following two conditions are satisfied⁴. The first condition is that at the relevant time⁵ the person (1) is a partner in a partnership comprised of all the persons who are or are to be members of the limited liability partnership (and no-one else)⁶; or (2) holds the property conveyed or transferred as nominee or bare trustee for one or more of the partners in such a partnership⁷. The second condition is that (a) the proportions of the property conveyed or transferred to which the persons mentioned in head (1) are entitled immediately after the conveyance or transfer are the same as those to which they were entitled at the relevant time⁸; or (b) none of the differences in those proportions has arisen as part of a scheme or arrangement of which the main purpose, or one of the main purposes, is avoidance of liability to any duty or tax⁹.

1 An instrument in respect of which stamp duty is not chargeable by virtue of the Limited Liability Partnerships Act 2000 s 12(1) is not to be taken to be duly stamped unless (1) it has, in accordance with the Stamp Act 1891 s 12 (see **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1007 et seq), been stamped with a particular stamp denoting that it is not chargeable with any duty or that it is duly stamped; or (2) it is stamped with the duty to which it would be liable apart from the Limited Liability Partnerships Act 2000 s 12(1): s 12(6). As to stamp duty see further **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

2 As to the meaning of 'limited liability partnership' see PARA 234.

3 As to incorporation see PARA 235.

4 Limited Liability Partnerships Act 2000 s 12(1).

5 'Relevant time' means (1) if the person who conveyed or transferred the property to the limited liability partnership acquired the property after its incorporation, immediately after he acquired the property; and (2) in any other case, immediately before its incorporation: Limited Liability Partnerships Act 2000 s 12(5).

6 Limited Liability Partnerships Act 2000 s 12(2)(a).

7 Limited Liability Partnerships Act 2000 s 12(2)(b). For these purposes a person holds property as bare trustee for a partner if the partner has the exclusive right (subject only to satisfying any outstanding charge, lien or other right of the trustee to resort to the property for payment of duty, taxes, costs or other outgoings) to direct how the property is to be dealt with: s 12(4).

8 Limited Liability Partnerships Act 2000 s 12(3)(a).

9 Limited Liability Partnerships Act 2000 s 12(3)(b).

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United

Kingdom are to registration by the registrar for that part of the United Kingdom:
Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI
2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in
subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an
enactment contained in, or in an instrument made under, a Measure or Act of the
National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/(1) INCORPORATION AND MEMBERSHIP/237. Name.

237. Name.

The name of a limited liability partnership¹ must end with the expression 'limited liability partnership', or the abbreviation 'llp' or 'LLP' (or the Welsh equivalents)². It is an offence for a person to carry on a business under a name or title which includes as the last words these expressions or any contraction or imitation of them, unless that person is a limited liability partnership or overseas limited liability partnership³. There are statutory restrictions on the names which may be registered for limited liability partnerships⁴.

A limited liability partnership may change its name at any time⁵ and notice of the change of name must be delivered to the Registrar of Companies⁶. If necessary, the Secretary of State may direct the limited liability partnership to change its name within such period as he may specify⁷, but the limited liability partnership may, within three weeks from the date of the direction apply to the court to set it aside and the court may set the direction aside or confirm it⁸. If a limited liability partnership fails to comply with a direction then both the limited liability partnership and any designated member in default, commit an offence⁹.

A change of name by a limited liability partnership does not affect any of its rights or duties, or render defective any legal proceedings against it, and any legal proceedings that might have been commenced or continued against it by its former name may be commenced or continued against it by its new name¹⁰.

1 As to the meaning of 'limited liability partnership' see PARA 234.

2 Limited Liability Partnerships Act 2000 s 1(6), Schedule para 2(1). If the incorporation document states that the registered office is to be situated in Wales, its name must end with one of the expressions 'limited liability partnership' and 'partneriaeth atebolrwydd cyfyngedig' or one of the abbreviations 'llp', 'LLP', 'pac' and 'PAC': Schedule para 2(2).

3 Limited Liability Partnerships Act 2000 Schedule para 7(1). A person who is guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: Schedule para 7(2). As to the standard scale see PARA 9 note 8. As to the meaning of 'overseas limited liability partnership' see PARA 243 note 3.

4 A limited liability partnership cannot be registered by a name (1) which has one of the expressions or abbreviations mentioned above in it, unless it is at the end; (2) which is the same as a name appearing in the index kept under the Companies Act 1985 s 714(1) (prospectively repealed) (see **COMPANIES** vol 14 (2009) PARA 163); (3) the use of which the Secretary of State considers would constitute a criminal offence; or (4) which in the opinion of the Secretary of State is offensive: Limited Liability Partnership Act 2000 Schedule para 3(1). As from a day to be appointed the Companies Act 1985 s 714 is repealed by the Companies Act 2006 s 1295, Sch 16 and will be replaced by the Companies Act 2006 s 66 (not yet in force). At the date at which this volume states the law no such day had been appointed. For determining whether one name is the same as another, see Schedule para 8 (amended by the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 6 para 10; and SI 2001/1228). Except with the approval of the Secretary of State, a limited liability partnership must not be registered by a name which (a) in the opinion of the Secretary of State would be likely to give the impression that it is connected in any way with Her Majesty's Government or with any local authority; or (b) includes any word or expression for the time being specified in regulations under the Companies Act 1985 s 29 (prospectively repealed) (see **COMPANIES** vol 14 (2009) PARA 196): Limited Liability Partnerships Act 2000 Schedule para 3(2). As from a day to be appointed the Companies Act 1985 s 29 is repealed by the Companies Act 2006 s 1295, Sch 16 and will be replaced by the Companies Act 2006 ss 54, 55 (not yet in force). At the date at which this volume states the law no such day had been appointed.

5 Limited Liability Partnerships Act 2000 Schedule para 4(1).

6 Limited Liability Partnerships Act 2000 Schedule para 5(1). As to the registrar see PARA 235 note 4. The notice must be in a form approved by the registrar, and must be signed by a designated member of the limited

liability partnership or authenticated in a manner approved by the registrar: Schedule para 5(2). As to designated members see PARA 240. Where the registrar receives such a notice he must, unless the new name is one by which a limited liability partnership may not be registered, enter the new name in the index kept under the Companies Act 1985 s 714(1) (prospectively repealed: see note 4), and issue a certificate of the change of name: Limited Liability Partnerships Act 2000 Schedule para 5(3). The change of name has effect from the date on which the certificate is issued: Schedule para 5(4).

The fee for registration of a change of the name of a limited liability partnership, other than a change made in response to a direction of the Secretary of State under Schedule para 4(2) (see note 7), is £50 for same day registration, and £10 for other than same day registration: Limited Liability Partnerships (Fees) Regulations 2004, SI 2004/2620, reg 4, Sch 3, Fee 3.

7 Where a limited liability partnership has been registered by a name which (1) is the same as or, in the opinion of the Secretary of State, too like a name appearing at the time of registration in the index kept under the Companies Act 1985 s 714(1) (prospectively repealed: see note 4); or (2) is the same as or, in the opinion of the Secretary of State, too like a name which should have appeared in the index at that time, then the Secretary of State may within 12 months of that time in writing direct the limited liability partnership to change its name within such period as he may specify: Limited Liability Partnerships Act 2000 Schedule para 4(2).

If it appears to the Secretary of State that misleading information has been given for the purpose of the registration of a limited liability partnership by a particular name, or that undertakings or assurances have been given for that purpose and have not been fulfilled, then he may, within five years of the date of its registration by that name, in writing direct the limited liability partnership to change its name within such period as he may specify: Schedule para 4(3).

If in the Secretary of State's opinion the name by which a limited liability partnership is registered gives so misleading an indication of the nature of its activities as to be likely to cause harm to the public, he may in writing direct the limited liability partnership to change its name within such period as he may specify: Schedule para 4(4).

Where a direction has been given specifying a period within which a limited liability partnership is to change its name, the Secretary of State may at any time before that period ends extend it by a further direction in writing: Schedule para 4(7).

8 Limited Liability Partnerships Act 2000 Schedule para 4(5). If the court confirms the direction, it must specify the period within which it must be complied with: Schedule para 4(5). 'Court' means (if the registered office of the limited liability partnership is situated in England and Wales or in Wales), the High Court: Schedule para 4(6).

9 Limited Liability Partnerships Act 2000 Schedule para 4(8). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: Schedule para 4(9). As to designated members see PARA 240.

10 Limited Liability Partnerships Act 2000 Schedule para 6.

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

237 Name

NOTE 4--Limited Liability Partnerships Act 2000 Schedule para 3 repealed: SI 2009/1804.

NOTE 6--SI 2004/2620 largely replaced by the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101 (amended by SI 2009/2439).

TEXT AND NOTES 7-9--Limited Liability Partnerships Act 2000 Schedule para 4(2)-(9) now para 4(2) (substituted by SI 2009/1804).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/(1) INCORPORATION AND MEMBERSHIP/238. Registered office.

238. Registered office.

A limited liability partnership¹ must at all times have a registered office situated in England and Wales or in Wales to which communications and notices may be addressed². A limited liability partnership may change its registered office by delivering notice of the change to the Registrar of Companies³.

1 As to the meaning of 'limited liability partnership' see PARA 234.

2 Limited Liability Partnerships Act 2000 Schedule para 9(1). On the incorporation of a limited liability partnership, the situation of its registered office is that stated in the incorporation document: Schedule para 9(2). As to the incorporation document see PARA 235. Where the registered office is situated in Wales, but the incorporation document does not state that it is to be situated in Wales, the limited liability partnership may deliver notice to the Registrar of Companies stating that its registered office is to be situated in Wales: Schedule para 9(3). Such a notice must be in a form approved by the registrar, and must be signed by a designated member of the limited liability partnership or authenticated in a manner approved by the registrar: Schedule para 9(4). As to the Registrar of Companies see PARA 235 note 4. As to designated members see PARA 240.

3 Limited Liability Partnerships Act 2000 Schedule para 10(1). The notice must be in a form approved by the registrar, and must be signed by a designated member of the limited liability partnership or authenticated in a manner approved by the registrar: Schedule para 10(2).

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/(1) INCORPORATION AND MEMBERSHIP/239. Members.

239. Members.

On the incorporation of a limited liability partnership¹ its members are the persons who subscribed their names to the incorporation document², other than any who have died or been dissolved³. Any other person may become a member by and in accordance with an agreement with the existing members⁴. A person may cease to be a member, as well as by death or dissolution, in accordance with an agreement with the other members or, in the absence of agreement with the other members as to cessation of membership, by giving reasonable notice to the other members⁵. A member is not to be regarded for any purpose as employed by the limited liability partnership unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership⁶.

The mutual rights and duties of the members of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its members, are governed by agreement between the members, or between the limited liability partnership and its members⁷. In the absence of any such agreement, the above rights are determined, subject to the provisions of the general law and to the terms of any limited liability partnership agreement⁸, by the following rules:

- 55 (1) all the members of a limited liability partnership are entitled to share equally in the capital and profits of the limited liability partnership⁹;
- 56 (2) the limited liability partnership must indemnify each member in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business¹⁰ of the limited liability partnership, or in or about anything necessarily done for the preservation of the business or property of the limited liability partnership¹¹;
- 57 (3) every member may take part in the management of the limited liability partnership¹²;
- 58 (4) no member is entitled to remuneration for acting in the business or management of the limited liability partnership¹³;
- 59 (5) no person may be introduced as a member or voluntarily assign an interest in a limited liability partnership without the consent of all existing members¹⁴;
- 60 (6) any difference arising as to ordinary matters connected with the business of the limited liability partnership may be decided by a majority of the members, but no change may be made in the nature of the business of the limited liability partnership without the consent of all the members¹⁵;
- 61 (7) the books and records of the limited liability partnership are to be made available for inspection at the registered office¹⁶ of the limited liability partnership or at such other place as the members think fit and every member of the limited liability partnership may, when he thinks fit, have access to and inspect and copy any of them¹⁷;
- 62 (8) each member must render true accounts and full information of all things affecting the limited liability partnership to any member or his legal representatives¹⁸;
- 63 (9) if a member, without the consent of the limited liability partnership, carries on any business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business¹⁹;

- 64 (10) every member must account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning the limited liability partnership, or from any use by him of the property of the limited liability partnership, name²⁰ or business connection²¹.

No majority of the members can expel any member unless a power to do so has been conferred by express agreement between the members²².

Where a member of a limited liability partnership has either ceased to be a member or has died, has become bankrupt or had his estate sequestrated or has been wound up, has granted a trust deed for the benefit of his creditors, or has assigned the whole or any part of his share in the limited liability partnership, absolutely or by way of charge or security²³, then the former member or his personal representative, his trustee in bankruptcy or liquidator, his trustee under the trust deed for the benefit of his creditors, or his assignee, may not interfere in the management or administration of any business or affairs of the limited liability partnership²⁴.

1 As to the meaning of 'limited liability partnership' see PARA 234.

2 As to the incorporation document see PARA 235.

3 Limited Liability Partnerships Act 2000 s 4(1).

4 Limited Liability Partnerships Act 2000 s 4(2).

5 Limited Liability Partnerships Act 2000 s 4(3).

6 Limited Liability Partnerships Act 2000 s 4(4). As to members as agents of the limited liability partnership see PARA 241.

7 Limited Liability Partnerships Act 2000 s 5(1)(a). Section 5(1) applies except as far as otherwise provided by the Limited Liability Partnerships Act 2000 or any other enactment (including subordinate legislation): ss 5(1), 18. An agreement made before the incorporation of a limited liability partnership between the persons who subscribe their names to the incorporation document may impose obligations on the limited liability partnership, to take effect at any time after its incorporation: s 5(2). As to incorporation see PARA 235.

8 'Limited liability partnership agreement' in relation to a limited liability partnership, means any agreement, express or implied, between the members of the limited liability partnership or between the limited liability partnership and the members of the limited liability partnership, which determines the mutual rights and duties of the members, and their rights and duties in relation to the limited liability partnership: Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 2.

9 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 7(1).

10 As to the meaning of 'business' see PARA 235 note 2.

11 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 7(2).

12 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 7(3).

13 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 7(4).

14 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 7(5).

15 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 7(6).

16 As to the registered office of a limited liability partnership see PARA 238.

17 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 7(7).

18 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 7(8).

19 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 7(9).

- 20 As to the name of a limited liability partnership see PARA 237.
- 21 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 7(10).
- 22 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 8.
- 23 Limited Liability Partnerships Act 2000 s 7(1).
- 24 Limited Liability Partnerships Act 2000 s 7(2). Section 7(2) does not affect any right to receive an amount from the limited liability partnership in that event: s 7(3).

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

239 Members

TEXT AND NOTES 1-6--The Limited Liability Partnerships Act 2000 s 4A (added by SI 2009/1804) applies where a limited liability partnership carries on business without having at least two members, and does so for more than six months: Limited Liability Partnerships Act 2000 s 4A(1). A person who, for the whole or any part of the period that it so carries on business after those six months is a member of the limited liability partnership, and knows that it is carrying on business with only one member, is liable, jointly and severally with the limited liability partnership, for the payment of the limited liability partnership's debts contracted during the period or, as the case may be, that part of it: Limited Liability Partnerships Act 2000 s 4A(2).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/(1) INCORPORATION AND MEMBERSHIP/240. Designated members.

240. Designated members.

If the incorporation document¹ of a limited liability partnership² specifies who are to be designated members they are designated members on incorporation, and any member may become a designated member by and in accordance with an agreement with the other members, and a member may cease to be a designated member in accordance with an agreement with the other members³. If there would otherwise be no designated members, or only one, every member is a designated member⁴. If the incorporation document states that every person who from time to time is a member of the limited liability partnership is a designated member, every member is a designated member⁵. A limited liability partnership may at any time deliver to the Registrar of Companies⁶ notice that specified members are to be designated members, or notice that every person who from time to time is a member of the limited liability partnership is a designated member, and, once it is delivered, the provisions described above have effect as if that were stated in the incorporation document⁷. A person ceases to be a designated member if he ceases to be a member⁸.

1 As to the incorporation document see PARA 235.

2 As to the meaning of 'limited liability partnership' see PARA 234.

3 Limited Liability Partnerships Act 2000 s 8(1). As to members see PARA 239.

4 Limited Liability Partnerships Act 2000 s 8(2).

5 Limited Liability Partnerships Act 2000 s 8(3).

6 As to the Registrar of Companies see PARA 235 note 4.

7 Limited Liability Partnerships Act 2000 s 8(4). Such a notice must be in a form approved by the registrar, and must be signed by a designated member of the limited liability partnership or authenticated in a manner approved by the registrar: s 8(5).

8 Limited Liability Partnerships Act 2000 s 8(6). As to the cessation of membership see PARA 239.

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

240 Designated members

NOTE 7--Limited Liability Partnerships Act 2000 s 8(5) repealed: SI 2009/1804.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/(1) INCORPORATION AND MEMBERSHIP/241. Members as agents.

241. Members as agents.

Every member of a limited liability partnership¹ is the agent of the limited liability partnership². However, a limited liability partnership is not bound by anything done by a member in dealing with a person if the member in fact has no authority to act for the limited liability partnership by doing that thing, and the person knows that he has no authority or does not know or believe him to be a member of the limited liability partnership³. Where a person has ceased to be a member of a limited liability partnership⁴, the former member is to be regarded, in relation to any person dealing with the limited liability partnership, as still being a member of the limited liability partnership unless the person has notice that the former member has ceased to be a member of the limited liability partnership, or notice that the former member has ceased to be a member of the limited liability partnership has been delivered to the Registrar of Companies⁵. Where a member of a limited liability partnership is liable to any person, other than another member of the limited liability partnership, as a result of a wrongful act or omission of his in the course of the business of the limited liability partnership or with its authority, the limited liability partnership is liable to the same extent as the member⁶.

1 As to the meaning of 'limited liability partnership' see PARA 234. As to members see PARAS 239-240.

2 Limited Liability Partnerships Act 2000 s 6(1). As to the principles of agency applicable to partners see further PARA 45 et seq; and **AGENCY**.

3 Limited Liability Partnerships Act 2000 s 6(2).

4 As to ex-members of limited liability partnerships see PARA 239.

5 Limited Liability Partnerships Act 2000 s 6(3). As to the Registrar of Companies see PARA 235 note 4.

6 Limited Liability Partnerships Act 2000 s 6(4). As to the liability of partners generally see PARA 45 et seq.

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/(1) INCORPORATION AND MEMBERSHIP/242. Registration of membership changes.

242. Registration of membership changes.

A limited liability partnership¹ must ensure that where a person becomes or ceases to be a member² or designated member³, notice is delivered to the Registrar of Companies⁴ within 14 days⁵. If a limited liability partnership fails to comply with this requirement, the partnership and every designated member commits an offence⁶.

A limited liability partnership must also ensure that where there is any change in the name or address of a member⁷, notice is delivered to the registrar within 28 days⁸.

In both cases, the notice must be in a form approved by the registrar, and must be signed by a designated member of the limited liability partnership or authenticated in a manner approved by the registrar, and, if it relates to a person becoming a member or designated member, must contain a statement that he consents to becoming a member or designated member signed by him or authenticated in a manner approved by the registrar⁹.

1 As to the meaning of 'limited liability partnership' see PARA 234.

2 As to ex-members of limited liability partnerships see PARA 239.

3 As to designated members see PARA 240.

4 As to the Registrar of Companies see PARA 235 note 4.

5 Limited Liability Partnerships Act 2000 s 9(1)(a). Where all the members from time to time of a limited liability partnership are designated members s 9(1)(a) does not require notice that a person has become or ceased to be a designated member as well as a member: s 9(2).

If an individual in respect of whom a confidentiality order under the Companies Act 1985 s 723B (prospectively repealed) (see **COMPANIES** vol 14 (2009) PARA 152) as applied to limited liability partnerships becomes a member of a limited liability partnership the notice to be delivered to the registrar under the Limited Liability Partnerships Act 2000 s 9(1) must contain the address for the time being notified by the member to the limited liability partnership under the Limited Liability Partnerships (Particulars of Usual Residential Address) (Confidentiality Orders) Regulations 2002, SI 2002/915, but must not contain his usual residential address, and with that notice the limited liability partnership must deliver to the registrar a notice in the prescribed form containing the usual residential address of that member: Companies Act 1985 s 288A (added by SI 2002/915). As from a day to be appointed the Companies Act 1985 ss 288A, 723B are prospectively repealed by the Companies Act 2006 s 1295, Sch 16 and will be replaced by the Companies Act 2006 ss 240-246 (not yet in force). At the date at which this volume states the law no such day had been appointed. The prescribed forms are set out in the Limited Liability Partnerships (Forms) Regulations 2002, SI 2002/690, and the Limited Liability Partnerships (Welsh Language Forms) Regulations 2003, SI 2003/61.

6 Limited Liability Partnerships Act 2000 s 9(4). It is a defence for a designated member charged with such an offence to prove that he took all reasonable steps for securing that the requirements of s 9(1) were complied with: s 9(5). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 9(6). As to the standard scale see PARA 9 note 8.

7 As to the name and address of members see PARA 239.

8 Limited Liability Partnerships Act 2000 s 9(1)(b).

9 Limited Liability Partnerships Act 2000 s 9(3). Where a confidentiality order under the Companies Act s 723B (prospectively repealed: see note 5) is made in respect of an existing member, the limited liability partnership must ensure that there is delivered within 28 days to the registrar notice in a form approved by the registrar containing the address for the time being notified to it by the member under the Limited Liability Partnerships (Particulars of Usual Residential Address) (Confidentiality Orders) Regulations 2002, SI 2002/915: Limited Liability Partnerships Act 2000 s 9(3A) (s 9(3A), (3B) added by SI 2002/915). Where such a

confidentiality order is in force the requirement in the Limited Liability Partnerships Act 2000 s 9(1)(b) to notify a change in the address of a member is to be read in relation to that member as a requirement to deliver to the registrar, within 28 days, notice of: (1) any change in the usual residential address of that member; and (2) any change in the address for the time being notified to the limited liability partnership by the member under the Limited Liability Partnerships (Particulars of Usual Residential Address) (Confidentiality Orders) Regulations 2002, SI 2002/915, and the registrar may approve different forms for the notification of each kind of address: Limited Liability Partnerships Act 2000 s 9(3B) (as so added).

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

242 Registration of membership changes

TEXT AND NOTES--Limited Liability Partnerships Act 2000 s 9 amended: SI 2009/1804.

NOTES 5, 9--SI 2002/915 revoked: SI 2009/1804.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/ (2) MODIFICATION OF EXISTING LEGISLATION/243. Application of existing law to limited liability partnerships.

(2) MODIFICATION OF EXISTING LEGISLATION

243. Application of existing law to limited liability partnerships.

Partnership law does not, in general, apply to a limited liability partnership¹, although regulations² may make provision about limited liability partnerships and overseas limited liability partnerships³ (not being provision about insolvency or winding up⁴) by applying or incorporating, with such modifications as appear appropriate, any law relating to partnerships⁵. Regulations may similarly make provision (1) applying or incorporating, with such modifications as appear appropriate, any law relating to companies or other corporations which would not otherwise have effect in relation to them⁶; or (2) providing for any law relating to companies or other corporations which would otherwise have effect in relation to them not to apply to them or to apply to them with such modifications as appear appropriate⁷.

Regulations make provision about the insolvency and winding up of limited liability partnerships by applying or incorporating, with such modifications as appear appropriate, certain provisions of the Insolvency Act 1986⁸. Regulations may also apply or incorporate, with such modifications as appear appropriate, any law relating to the insolvency or winding up of companies or other corporations which would not otherwise have effect in relation to them, and may provide for any law relating to the insolvency or winding up of companies or other corporations which would otherwise have effect in relation to them not to apply to them or to apply to them with such modifications as appear appropriate⁹.

1 Limited Liability Partnerships Act 2000 s 1(5). But see the Limited Liability Partnerships Act 2000 ss 5, 6; and PARAS 239, 241.

2 The regulations made by the Secretary of State by statutory instrument: see the Limited Liability Partnerships Act 2000 ss 17(1), (4), (5), (6), 18. Regulations may, in particular: (1) make provisions for dealing with non-compliance with any of the regulations (including the creation of criminal offences); (2) impose fees; and (3) provide for the exercise of functions by persons prescribed by the regulations: s 17(2). They may also contain any appropriate consequential, incidental, supplementary or transitional provisions or savings, and make different provision for different purposes: s 17(3). Regulations may make in any enactment such amendments or repeals as appear appropriate in consequence of the Limited Liability Partnerships Act 2000 or regulations made under it: s 16(1). The regulations may, in particular, make amendments and repeals affecting companies or other corporations or partnerships: s 16(2). For the consequential amendments made by the Limited Liability Partnerships Regulations 2001, SI 2001/1090, see reg 9, Sch 5.

3 'Overseas limited liability partnership' means a body incorporated or otherwise established outside Great Britain and having such connection with Great Britain, and such other features, as regulations may prescribe: Limited Liability Partnerships Act 2000 ss 14(3), 18. As to the meaning of 'Great Britain' see PARA 8 note 4.

4 See the text and notes 8-9.

5 Limited Liability Partnerships Act 2000 s 15(c). 'Modifications' includes additions and omissions: s 18.

6 Limited Liability Partnerships Act 2000 s 15(a). As to the application of company law to limited liability partnerships see the Limited Liability Partnerships Regulations 2001, SI 2001/1090; the Limited Liability Partnerships (No 2) Regulations 2002, SI 2002/913; and PARA 245.

7 Limited Liability Partnerships Act 2000 s 15(b).

8 Limited Liability Partnerships Act 2000 s 14(1). As to the application of insolvency legislation to limited liability partnerships see the Limited Liability Partnerships Regulations 2001, SI 2001/1090; and PARA 244.

9 Limited Liability Partnerships Act 2000 s 14(2). See the Limited Liability Partnerships Regulations 2001, SI 2001/1090; and PARA 244.

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

243 Application of existing law to limited liability partnerships

NOTE 2--Limited Liability Partnerships Act 2000 s 17(5) amended: SI 2009/1804.

NOTE 6--See also the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008, SI 2008/1911 (amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes, and amended by SI 2009/1804), the Small Limited Liability Partnerships (Accounts) Regulations 2008, SI 2008/1912, and the Large and Medium-sized Limited Liability Partnerships (Accounts) Regulations 2008, SI 2008/1913, which apply provisions of the Companies Act 2006 Pts 15, 16 (ss 380-539) (accounts and audit) to limited liability partnerships. SI 2002/913 revoked: SI 2009/1804.

NOTE 8--Limited Liability Partnerships Act 2000 s 14(1) amended: SI 2009/1804.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/ (2) MODIFICATION OF EXISTING LEGISLATION/244. Insolvency legislation.

244. Insolvency legislation.

Certain provisions of the Insolvency Act 1986¹ concerning insolvency and winding up apply² to limited liability partnerships³ with the following modifications to terminology:

- 65 (1) references to a company include references to a limited liability partnership⁴;
- 66 (2) references to a director or to an officer of a company include references to a member⁵ of a limited liability partnership⁶;
- 67 (3) references to a shadow director include references to a shadow member⁷;
- 68 (4) references to the Companies Act 1985, the Company Directors Disqualification Act 1986, the Companies Act 1989 or to any provisions of those Acts or to any provisions of the Insolvency Act 1986 include references to those Acts or provisions as they apply to limited liability partnerships by virtue of the Limited Liability Partnerships Act 2000⁸;
- 69 (5) references to the memorandum of association of a company and to the articles of association of a company include references to the limited liability partnership agreement⁹ of a limited liability partnership¹⁰.

Specified modifications¹¹ are also made to the statutory wording of certain provisions of the Insolvency Act 1986¹², and those provisions may apply to limited liability partnerships with such further modification as the context requires¹³.

Specified statutory instruments also apply (as from time to time in force) to limited liability partnerships with such modifications as the context requires for the purpose of giving effect to the relevant provisions of the Insolvency Act 1986¹⁴.

1 Ie the Insolvency Act 1986 Pts I-IV (ss 1-219), Pts VI-VII (ss 230-251) and Pts XII-XIX (ss 386-444). These provisions are dealt with elsewhere in this work: see **COMPANIES**; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1302-1309.

2 Ie by virtue of the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 5(1) (made under the Limited Liability Partnerships Act 2000 s 14: see PARA 243).

3 As to the meaning of 'limited liability partnership' see PARA 234.

4 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 5(2)(a).

5 As to members see PARAS 239-240.

6 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 5(2)(b).

7 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 5(2)(c). 'Shadow member', in relation to limited liability partnerships, means a person in accordance with whose directions or instructions the members of the limited liability partnership are accustomed to act, but so that a person is not deemed a shadow member by reason only that the members of the limited partnership act on advice given by him in a professional capacity: reg 2.

8 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 5(2)(d).

9 As to the meaning of 'limited liability partnership agreement' see PARA 239 note 8.

10 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 5(2)(e).

11 The detailed modifications are set out in the Limited Liability Partnerships Regulations 2001, SI 2001/1090, Sch 3 (amended by SI 2005/1989): see **COMPANY AND PARTNERSHIP INSOLVENCY**.

12 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 5(2)(f). See note 1.

13 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 5(2)(g).

14 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 10(1)(b). The following subordinate legislation is specified in Sch 6 as applying with necessary modification to limited liability partnerships: the Insolvency Practitioners Regulations 1990, SI 1990/439 (revoked: see now the Insolvency Practitioners Regulations 2005, SI 2005/524); the Insolvency Practitioners (Recognised Professional Bodies) Order 1986, SI 1986/1764; the Insolvency Rules 1986, SI 1986/1925; the Insolvency Fees Order 1986, SI 1986/2030 (revoked: see now the Insolvency Proceedings (Fees) Order 2004, SI 2004/593); the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, SI 1986/2123; the Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996, SI 1996/253; the Co-operation of Insolvency Courts (Designation of Relevant Country) Order 1998, SI 1998/2766; the Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996; the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952; the Insolvency Regulations 1994, SI 1994/2507; the Insolvency (Amendment) Regulations 2000, SI 2000/485 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**).

In the case of any conflict between any provision of the subordinate legislation listed above and any provision of the Limited Liability Partnerships Regulations 2001, SI 2001/1090, the latter must prevail: reg 10(2).

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

244 Insolvency legislation

TEXT AND NOTES 8, 10--SI 2001/1090 reg 5(2)(d), (e) amended: SI 2009/1941.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/ (2) MODIFICATION OF EXISTING LEGISLATION/245. Companies legislation.

245. Companies legislation.

The provisions of the Companies Act 1985 which relate to accounts and audit¹ apply² to limited liability partnerships³, except where the context otherwise requires, with the following modifications as to terminology:

- 70 (1) references to a company include references to a limited liability partnership⁴;
- 71 (2) references to a director or to an officer of a company include references to a member of a limited liability partnership⁵;
- 72 (3) references to other provisions of the Companies Act 1985 and to provisions of the Insolvency Act 1986 include references to those provisions as they apply to limited liability partnerships⁶.

Specified modifications⁷ are also made to the statutory wording of those provisions of the Companies Act 1985⁸ and certain provisions of the Companies Act 2006⁹ along with such further modifications as the context requires for the purpose of giving effect to them¹⁰.

Further specified provisions of the Companies Act 1985¹¹ apply to limited liability partnerships, except where the context otherwise requires, with the following modifications as to terminology:

- 73 (a) references to a company include references to a limited liability partnership¹²;
- 74 (b) references to the Companies Acts include references to the Limited Liability Partnerships Act 2000 and regulations made thereunder¹³;
- 75 (c) references to the Insolvency Act 1986 include references to that Act as it applies to limited liability partnerships¹⁴;
- 76 (d) references in a provision of the Companies Act 1985 to other provisions of that Act include references to those other provisions as they apply to limited liability partnerships¹⁵;
- 77 (e) references to the memorandum of association of a company include references to the incorporation document of a limited liability partnership¹⁶;
- 78 (f) references to a shadow director include references to a shadow member¹⁷;
- 79 (g) references to a director of a company or to an officer of a company include references to a member of a limited liability partnership¹⁸.

Specified modifications¹⁹ are also made to the statutory wording of those provisions of the Companies Act 1985 along with such further modifications as the context requires for the purpose of giving effect to them²⁰.

The provisions of the Company Directors Disqualification Act 1986²¹ apply to limited liability partnerships, except where the context otherwise requires, with the following modifications as to terminology:

- 80 (i) references to a company include references to a limited liability partnership²²;
- 81 (ii) references to the Companies Acts include references to the Limited Liability Partnerships Act 2000, and regulations made thereunder, and references to the companies legislation include references to the Limited Liability Partnerships Act

- 2000, regulations made thereunder and to any enactment applied by regulations to limited liability partnerships²³;
- 82 (iii) references to the Insolvency Act 1986 include references to that Act as it applies to limited liability partnerships²⁴;
- 83 (iv) references to the memorandum of association of a company include references to the incorporation document of a limited liability partnership²⁵;
- 84 (v) references to a shadow director include references to a shadow member²⁶;
- 85 (vi) references to a director of a company or to an officer of a company include references to a member of a limited liability partnership²⁷.

Specified modifications²⁸ are also made to the statutory wording of the provisions of the Company Directors Disqualification Act 1986 along with such further modifications as the context requires for the purpose of giving effect to them²⁹.

Specified statutory instruments also apply (as from time to time in force) to limited liability partnerships with such modifications as the context requires for the purpose of giving effect to the relevant provisions of the Companies Act 1985, the Business Names Act 1985 and the Company Directors Disqualification Act 1986³⁰.

1 In the Companies Act 1985 Pt VII (ss 221-262A): see **COMPANIES** vol 15 (2009) PARA 708 et seq. To the extent that those provisions are repealed by the Companies Act 2006 s 1295, Sch 16, the repeal does not currently affect the operation of those provisions as applied by the Limited Liability Partnerships Regulations 2001, SI 2001/1090, to limited liability partnerships: see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 8(2); the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 12(1). However, as from 1 October 2008 the Limited Liability Partnerships Regulations 2001, SI 2001/1090, are partially revoked by the Limited Liability Partnership (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008, SI 2008/1911; and as from 1 October 2008 in relation to accounts for financial years beginning on or after that date, the Limited Liability Partnership (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008, SI 2008/1911, apply accounts and audit provisions contained in the Companies Act 2006 Pt 15 (ss 380-474) and Pt 16 (ss 475-539) with modifications to limited liability partnerships. As to the form and contents of accounts see the Large and Medium-sized Limited Liability Partnerships (Accounts) Regulations 2008, SI 2008/1913, and the Small Limited Liability Partnerships (Accounts) Regulations 2008, SI 2008/1912, which (as from 1 October 2008) apply certain provisions of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, and the Small Companies and Groups (Accounts and Director's Report) Regulations 2008, SI 2008/409, with modifications to limited liability partnerships.

For the prescribed forms to be used in the context of limited liability partnerships see the Limited Liability Partnerships (Forms) Regulations 2001, SI 2001/927; and the Limited Liability Partnerships (Welsh Language Forms) Regulations 2001, SI 2001/2917. For the relevant fees payable to the Registrar of Companies see the Limited Liability Partnerships (Fees) Regulations 2004, SI 2004/2620.

2 In by virtue of the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 3(1) (made under the Limited Liability Partnerships Act 2000 s 15: see PARA 243). The Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 3, Sch 1 (which apply provisions of the Companies Act 1985 to limited liability partnerships) are revoked as from 1 October 2008 with savings in relation to financial years beginning before 1 October 2008: see the Limited Liability Partnership (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008, SI 2008/1911, reg 58.

3 As to the meaning of 'limited liability partnership' see PARA 234.

4 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 3(2)(a) (prospectively revoked: see notes 1, 2).

5 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 3(2)(b) (prospectively revoked: see notes 1, 2). As to membership generally see PARA 239 et seq.

6 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 3(2)(c) (prospectively revoked: see notes 1, 2).

7 The detailed modifications are set out in the Limited Liability Partnerships Regulations 2001, SI 2001/1090, Sch 1 (amended by SI 2005/1989; and SI 2008/497) (prospectively revoked: see notes 1, 2). See **COMPANY AND PARTNERSHIP INSOLVENCY**.

8 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 3(2)(d) (prospectively revoked: see notes 1, 2). The provisions of the Companies Act 1985 referred to in the text are those contained in Pt VII (ss 221-262A).

9 The Companies Act 2006 s 443 (calculation of period allowed for filing accounts and reports) applies to limited liability partnerships with modifications: see the Companies (Late Filing Penalties) and Limited Liability Partnerships (Filing Periods and Late Filing Penalties) Regulations 2008, SI 2008/497, reg 6, Schedule; and **COMPANIES** vol 15 (2009) PARA 870.

10 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 3(2)(e) (prospectively revoked: see notes 1, 2).

11 In those provisions of the Companies Act 1985 specified in the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4, Sch 2 Pt 1 col 1 (amended by SI 2004/355; SI 2007/2073). To the extent that those provisions are repealed by the Companies Act 2006 s 1295, Sch 16, the repeal does not affect the operation of those provisions as applied by the Limited Liability Partnerships Regulations 2001, SI 2001/1090, to limited liability partnerships: see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 8(2); the Companies Act 2006 (Commencement No 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/1093, art 11(1); the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 12(2); the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 12(1); the Companies Act 2006 (Commencement No 6, Saving and Commencement Nos 3 and 5 (Amendment)) Order 2008, SI 2008/674, art 6(1).

The Limited Liability Partnerships (No 2) Regulations 2002, SI 2002/913, apply the provisions of the Companies Act 1985 ss 723B-723F (see **COMPANIES** vol 14 (2009) PARA 30) to limited liability partnerships: see the Limited Liability Partnerships (No 2) Regulations 2002, SI 2002/913, reg 3, Schedule. The Companies Act 1985 ss 723B-723F are repealed by the Companies Act 2006 s 1295, Sch 16 as from a day to be appointed. At the date at which this volume states the law no such day had been appointed. Note that the Companies Act 1985 s 723C(1)(a) was repealed on 1 January 2007 by the Companies Act 2006 s 1295, Sch 16 (see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 7(a)) but that repeal does not apply to the application of the Companies Act 1985 723C(1)(a) to limited liability partnerships by the Limited Liability Partnerships (No 2) Regulations 2002, SI 2002/913: see the Companies Act 2006 (Commencement No 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/1093, art 11(2).

12 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(1)(a).

13 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(1)(b).

14 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(1)(c).

15 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(1)(d).

16 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(1)(e). As to the incorporation document see PARA 235.

17 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(1)(f). As to the meaning of 'shadow member' see PARA 244 note 7.

18 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(1)(g).

19 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(1)(h). The detailed modifications are specified in Sch 2 Pt I col 2 (amended by SI 2007/2073) opposite the provision specified in col 1.

20 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(1)(i).

21 See **COMPANIES** vol 15 (2009) PARA 1575 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1107 et seq.

22 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(2)(a).

23 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(2)(b).

24 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(2)(d). As to the application of the Insolvency Act 1986 to limited liability partnerships see PARA 244.

25 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(2)(e).

- 26 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(2)(f).
- 27 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(2)(g).
- 28 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(2)(h). The detailed modifications are specified in Sch 2 Pt II col 2 opposite the provision specified in col 1.
- 29 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 4(2)(i).
- 30 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 10(1)(a), (c). The following subordinate legislation is specified in Sch 6 as applying with necessary modification to limited liability partnerships: the Companies (Revision of Defective Accounts and Report) Regulations 1990, SI 1990/2570 (revoked: see now the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373); the Companies (Defective Accounts) (Authorised Person) Order 1991, SI 1991/13 (revoked: see now the Companies (Defective Accounts) (Authorised Person) Order 2005, SI 2005/699); the Accounting Standards (Prescribed Body) Regulations 1990, SI 1990/1667 (revoked: see now the Accounting Standards (Prescribed Body) Regulations 2005, SI 2005/697); the Companies (Inspection and Copying of Registers, Indices and Documents) Regulations 1991, SI 1991/1998; the Companies (Registers and other Records) Regulations 1985, SI 1985/724; the Companies Act 1985 (Disclosure of Remuneration for Non-Audit Work) Regulations 1991, SI 1991/2128; the Companies Act 1985 (Power to Enter and Remain on Premises: Procedural) Regulations 2005, SI 2005/684; the Company and Business Names Regulations 1981, SI 1981/1685; the Companies (Disqualification Orders) Regulations 1986, SI 1986/2067 (revoked: see now the Companies (Disqualification Orders) Regulations 2001, SI 2001/967); the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023; the Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386; the Uncertificated Securities Regulations 1995, SI 1995/3272 (revoked: see now the Uncertificated Securities Regulations 2001, SI 2001/3755); the Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909: see **COMPANIES; COMPANY AND PARTNERSHIP INSOLVENCY**.

In the case of any conflict between any provision of the subordinate legislation listed above and any provision of the Limited Liability Partnerships Regulations 2001, SI 2001/1090, the latter must prevail: reg 10(2).

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

245 Companies legislation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

NOTE 1--SI 2004/2620 largely replaced by the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101 (amended by SI 2009/2439). SI 2008/1911 amended: SI 2009/1804.

NOTE 9--The Companies Act 2006 ss 43-49, 51-57, 65-76, 82, 83, 85-88, 162-165, 240-246, 738-750, 752-754, 769-771, 774-776, 778, 782, 854-855A, 858, 860-892, 895-900, 993-997, 1000-1034, 1051, 1060, 1064-1066, 1068-1082, 1084-1091, 1093-1098, 1103-1119, 1121, 1122, 1125-1142, 1154-1157, 1172, 1173, 1288-1290, 1292, 1297

apply to limited liability partnerships with modifications: see the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804 (amended by SI 2009/1833, SI 2009/2476, SI 2009/2995); and **COMPANIES**.

NOTE 11--SI 2002/913 revoked: SI 2009/1804.

TEXT AND NOTES 13, 16, 17--SI 2001/1090 reg 4(1)(b), (e), (f) revoked: SI 2009/1804.

TEXT AND NOTE 15--SI 2001/1090 reg 4(1)(d) substituted: SI 2009/1804.

TEXT AND NOTE 25--SI 2001/1090 reg 4(2)(e) revoked: SI 2009/1941.

TEXT AND NOTE 30--'The Business Names Act 1985' omitted: SI 2001/1090 reg 10(1)(c) (amended by SI 2009/1804).

NOTE 30--SI 1981/1685 (as amended) replaced: Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2009, SI 2009/2615. The Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, Pts 1-3 (regs 1-21), 5 (regs 65, 66) apply to limited liability partnerships with modifications: see SI 2009/1804 reg 46; and **COMPANIES** vol 15 (2009) PARA 1451. The Overseas Companies Regulations 2009, SI 2009/1801, regs 58(2), 59, 61, 62, 66, 67(1), (2) apply to limited liability partnerships with modifications: see SI 2009/1804 reg 59; and **COMPANIES** vol 15 (2009) PARA 1832.

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/ (2) MODIFICATION OF EXISTING LEGISLATION/246. Financial services legislation.

246. Financial services legislation.

Certain provisions of the Financial Services and Markets Act 2000¹ apply to limited liability partnerships, except where the context requires², with the following modifications:

- 86 (1) references to a company include references to a limited liability partnership³;
- 87 (2) references to a body include references to a limited liability partnership⁴;
- 88 (3) references to the Companies Act 1985, the Insolvency Act 1986 or to any of the provisions of those Acts include references to those Acts or provisions as they apply to limited liability partnerships by virtue of the Limited Liability Partnerships Act 2000⁵.

1 The Financial Services and Markets Act 2000 ss 215(3), (4), (6), 356, 359(1)-(4), 361, 365, 367, 370, 371 (see **FINANCIAL SERVICES AND INSTITUTIONS**).

2 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 6(1), (2) (made under the Limited Liability Partnerships Act 2000 s 15: see PARA 243). As to the meaning of 'limited liability partnership' see PARA 234.

3 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 6(2)(a).

4 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 6(2)(b).

5 Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 6(2)(c). As to the application of the Companies Act 1985 to limited liability partnerships see PARA 245. As to the application of the Insolvency Act 1986 to limited liability partnerships see PARA 244.

UPDATE

234-300 Limited Liability Partnerships

In any enactment relating to limited liability partnerships (1) 'the registrar' has the meaning given by the Limited Liability Partnerships Act 2000 s 18 (see PARA 235); (2) 'the register' means the records kept by the registrar relating to limited liability partnerships; and (3) references to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom: Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Sch 3, para 12(1). 'Enactment' includes (a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; and (b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales: SI 2009/1804 Sch 3 para 12(2).

Halsbury's Laws of England/PARTNERSHIP (VOLUME 79 (2008) 5TH EDITION)/6. LIMITED LIABILITY PARTNERSHIPS/ (2) MODIFICATION OF EXISTING LEGISLATION/247-300. Taxation of limited liability partnerships.

247-300. Taxation of limited liability partnerships.

The application of the tax legislation to limited liability partnerships is dealt with elsewhere in this work¹.

¹ See **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 240; **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1070, 1071, 1077; **INHERITANCE TAXATION** .